UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

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BAE Systems Ordnance Systems, Inc.,

Plaintiff,

vs.

FLUOR FEDERAL SOLUTIONS, LLC,

Defendant.

CIVIL ACTION NUMBER 7:20-CV-00587
JANUARY 14, 2022 10:00 A.M.
MOTION HEARING VIA ZOOM

Before:
HONORABLE MICHAEL F. URBANSKI
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

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(Court convened at 10:00 a.m.)

THE COURT: Let's ask the clerk to call the case.

THE CLERK: Yes, Your Honor.

We have *BAE Systems Ordnance Systems, Inc. versus Fluor Federal Solutions, LLC*, Civil Action 7:20-CV-587 for a motions hearing.

THE COURT: Okay. Good morning, Counsel. I've read these hundreds of pages of briefs that you-all filed and looked at this contract, this subcontract, which appears to be a put-together conglomeration of several different kinds of documents, or a main document with a bunch of attachments. And my law clerk and I, Zach Turk, have tried to study the contract language.

I want to hear first this morning from BAE and then Fluor about the Rule 12(f) motion, and we'll go from there, as needed, to the Rule 12(b)(6) motions.

So let's hear first from BAE on the Rule 12 motion that you have filed.

MR. TREECE: Thank you, Your Honor. Joshua Treece on behalf of BAE. And with me today, I would like to introduce BAE's in-house counsel that is joining us. We have Alice Eldridge, senior vice president and general counsel for BAE; Catherine Ronis, vice president and associate general counsel for BAE; and Joseph Port, senior in-house counsel for BAE.

I also have with me today, Your Honor, Karen

Stemland -- she is in my office not appearing by video -- and Justin Simmons.

And as an administrative matter, Your Honor, we understand the order of the arguments that you would like and will proceed in that manner. I wanted to let the Court know that Mr. Simmons is going to argue with respect to Fluor's partial motion to dismiss, and I'm going to handle BAE's Rule 12(f) motion and motion to dismiss.

And then just as a housekeeping matter, I wanted to let the Court know and make sure the Court has received it, we sent a binder of the mostly contract documents that were highlighted to the Court and also to opposing counsel. Your Honor, I don't know if you were able to get that. I'm not sure if your -- it sounds like you might be a little under the weather, so I'm not sure if you've received that.

THE COURT: No, I'm not under the weather. I'm fine.

MR. TREECE: Oh, okay.

THE COURT: Chambers received the binders this morning. We were there waiting for them last night, but they didn't show up last night. But I understand they've been delivered this morning and we'll be sure to take a look at them.

MR. TREECE: Certainly. Thank you, Your Honor. And then we also have delivered hard copies of the slides.

So let me go ahead now and share the screen for our

Rule 12(f). It looks like the host has disabled screen sharing. I don't know if that's something that we can remedy.

THE CLERK: Yes, sir. Give me just one second.

MR. TREECE: Sure.

And, Your Honor, while we are working to pull up the slides, I want to begin with some short background.

As the Court is aware, this is a firm fixed-priced, design-build contract to design and construct the NC Facility at the Radford Arsenal. That's the Nitrocellulose Facility.

With respect to the 12(f) motion, relevant background on that issue, Your Honor, is the subcontract was entered into on December 17th, 2015. Before the subcontract was entered into and before the parties agreed to the damages -- limitation on damages therein and the damages cap therein, Fluor actually had started work on the project, and they did so under something called an undefinitized contract action.

And Your Honor will see at the very outset of the agreement, and I've got a slide in here to kind of cull that out for the Court, but at the very outset of the agreement, there's all this work that precipitated the definitization of the final subcontract, which is to say Fluor was paid to start work before the final subcontract was entered.

And this is just in, you know, the contracts of this type, it's a matter of efficiency where you can go ahead and start the work before you enter the agreement. And that's

what happened here. So before any limitation of damages was entered, Fluor had begun the work under the UCAs, is what we refer to them as, so the undefinitized contract action.

Now, with that, let me see if I can go ahead and get our slides before the Court.

Is everyone seeing the opening slide for the Rule 12(f) motion?

THE COURT: I see it.

MR. TREECE: All right. Thank you.

And, Your Honor, so with respect to the motion to strike the first thing to point out is the subcontract is a fully integrated and merged agreement. It constitutes the entire agreement of the parties. So for present purposes, the Court need look no further than the four corners of the agreement. The same is true with the motion to dismiss, which we'll discuss later.

THE COURT: Well, how can I do that if two of the three limitation of damages provisions include changes and the third one does not?

MR. TREECE: Your Honor, those are -- the reason you can do that is because that remains entirely unambiguous. And the reason it remains unambiguous is there are three provisions, all of which essentially say the same thing --

THE COURT: Well, they don't, because the third one says "including changes," and the other -- no, the third one

does not include -- have the "including changes" language. And is that significant?

MR. TREECE: It's not significant, Your Honor, because what it is, it's a definition, right? So this says the "subcontract shall be limited to 30 million. 30 million being defined," so that's the definition of 30 million here, "as the value including all changes and the maximum liability for damages."

So you have two provisions that say, "30 million. Here's the definition of 30 million, defined as the value including changes." And then you have another provision that says "limited to 30 million." It doesn't restate the definition a third time, but as Your Honor is aware, that's the point of a definition, so you don't have to continually restate it throughout the document, right?

THE COURT: Well, does the fact that two of the three include changes and one does not, does that create ambiguity requiring some -- the Court to allow discovery on this issue?

MR. TREECE: Absolutely not, Your Honor, for the reason I just mentioned, is all of them consistently say the cap is 30 million. There's a definition of that cap in two different places that say, "30 million is the value of all changes." There's nothing, nothing that impliedly contradicts that definition in any way, shape, or form. It is crystal clear that the definition of 30 million includes all --

includes the value of all changes, the maximum liability for damages. It is a definition --

THE COURT: Let me ask you this. Let me ask you this: Do I even need to get to the changes language? Because you-all argue that Fluor didn't properly submit changes and what they're really doing here is trying to recover their own cost overruns.

MR. TREECE: Correct. Yeah, Your Honor doesn't need to get to that. Your Honor can interpret this and say under any circumstance Fluor is limited to 30 million. Whether they call it changes, whether they're actually just cost overruns, which is what they are, in both cases they're limited to 30 million.

We point out changes because Fluor tries to incorrectly characterize them as changes, and we say, "Well, even if you take your incorrect and factually unsupported characterization as true, it's still barred, so under no circumstance can you exceed 30 million." So that's where we are with respect to that issue, Your Honor.

And, you know, what's interesting here is Fluor proposed this language, right? They cite to a statute, which I'll get to later in this presentation, but they cite to a statute that's really designed to protect the small subcontractors from big general contractors. Here Fluor is a large company, of course. They are experts in design/build

contracts; they allege the same in their counterclaim. And they are the ones that proposed this, right? So they're trying to remove from the contract their own damages cap, which is stunning to say the least.

THE COURT: Well, here's the problem I have with this, with this claim for damages above 30 million: You-all attach an e-mail between the two people that are the point of contact on this contract in which Fluor's representative says, "If we sue each other, we're limited to 30 million."

Now, I know I can't consider that at 12(f) because it's -- well, maybe I can; I don't know. But whether I deal with this at Rule 12 or Rule 56, how in the world can Fluor bring a claim for more than $30 million at the end of the day? I mean, where is the good-faith basis for it? Their own contracting person said, "We can't bring a claim for more than $30 million." That's what this contract says.

So unless it's barred by the statute, it seems to me that whether it's Rule 12 or Rule 56, I don't see how in good faith Fluor can make that claim.

What's your position, Mr. Treece?

MR. TREECE: I agree with you wholeheartedly. Now, I mean, and more importantly that e-mail -- and I realize the Court doesn't need to reach that issue because it is unambiguous, but that e-mail says, "We've got a read from legal." That's their legal department's interpretation that

was communicated to BAE.

Again, we're not saying the Court has to deal with that; at Rule 56 the Court certainly would. But now we need --

THE COURT: I'm just saying there's a lot of time and effort teed up in this litigation where Fluor is seeking $185 million in damages when their own documents, their own e-mails establish that Fluor understands they can't sue for any more than 30 million. So I don't understand how counsel can in good faith make these arguments, because at the end of the day, when that person is deposed, they're going to say what that e-mail says.

So let's turn to what I think is the important issue here, is the applicability of this Virginia statute. Because, I mean, if the statute applies, then it doesn't matter what Fluor says, this thing is out. So the question is, does the statute apply in this case?

MR. TREECE: Absolutely not, Your Honor. I'm going to move this forward to those slides. So the statute plainly, plainly does not apply, and there are numerous reasons for which it doesn't apply. So, first, the statute applies only to private projects not government projects.

THE COURT: Well, how do we know that? The statute on its face doesn't say it only applies to private projects. I mean, it doesn't say that. And there's no limitation or

exclusion in there about public versus private. So I want to know what your basis is for arguing that it only applies to private contracts.

MR. TREECE: Certainly, Your Honor. So with respect to the statute and private projects, so we provided the Court the secondary source, recognizing that it bars prospective bond waiver claims on private projects. And also, this was passed under Senate Bill 891, and it is expressly defined as a statute "relating to mechanics' liens; subcontractors' waiver of lien rights." It's expressly relating to mechanics' liens, and it also deals with asserting a claim. Nonetheless, the statute is expressly related to that issue.

Pursuant to a long-standing Virginia law, statutes relating to mechanics' liens do not, in the absence of an express (statutory) provision, apply to government buildings or projects. This was established in 1899, Your Honor, and again restated in *Jones*, recognizing mechanics' lien statutes do not, in the absence of an express provision, apply to public buildings erected by states, counties, and towns for public use. And so that is the reason.

And if Your Honor looks at the immediately preceding section, this is one that voids indemnification for negligence. And even that section is an express provision applying it to public projects. So we know that for this statute to apply to public buildings and projects would need

to have an express provision applying it to public buildings and projects. It does not have that, so that is one basis upon which it plainly doesn't apply here.

And just kind of more to that point, it's interesting to note the Virginia Procurement Act has a statutory cap. So the Virginia Public Procurement Act says that, "A public contract may include a provision for modification of the contract during performance, but no fixed-price contract," which is what we have, "may be increased by more than 25 percent of the amount of the contract or 50,000." So it's a statutory cap. And then it goes on to say, "whichever is greater, without the advanced written approval of the Governor." So there's a cap that requires the governor to approve anything that goes beyond it. This statute remains in effect, this Virginia Public Procurement Act.

What Fluor's position is, is Fluor's position is that 11-4.1:1 somehow makes this void and unenforceable. That is plainly not how this statute works, and that's the reason it only applies to private projects not the one we're dealing with.

Your Honor, the reasons that we provide for the inapplicability of this statute to our circumstance are entirely independent based, right? So this is one, that it doesn't apply to private projects. The second is, from the facts here, Fluor provided services and materials on this

project before the subcontract was definitized --

THE COURT: Is that a fact in dispute? How can I rule on that on a Rule 12(f) claim?

MR. TREECE: Your Honor can rule on that because it's not a fact in dispute, because it's acknowledged in the contracts themselves. And let me get just directly to that.

So this, Your Honor, Docket 1-2 -- it's in your binder. It's also Docket 1-2 at 4. This is the second page of the very start of this subcontract, right? So you've got the order, and then you have the UCAs, right? So this is the UCA work that was done before the subcontract was entered. And you see here -- this will be relevant as well when we get to our motion to dismiss -- they were paid -- I think this is on the order of $36 million in total. It's something in that neighborhood.

So they were paid for design engineering, $10 million for design engineering in advance. Mustang -- Mustang is a design engineering firm they originally hired to do their design work. Mustang was paid 500 hours before the subcontract was entered, to evaluate the Lauren design and everything else. And then you've got engineering cost, steel purchased. They were doing all of this work.

All of this work is incorporated in the subcontract. You see right below this, "Subcontract description on page 3." Go to page 3. This is page 3. "This firm fixed-price

subcontract agreement is issued for efforts to support the NC facility, and incorporates funding provided by the UCA," so the funding previously, "and subsequent modifications prior to definitizing the subcontract." The potential ceiling is 245 million. Yeah, so it's 31 million for these UCA tasks, right?

And so Your Honor is aware, I know that you may not have the binder in front of you, but when you do get the binder in front of you, we have provided the Court -- it's also, for the Court's reference to pull it up on the docket, it's docket -- it's docket 1-4.

This is the undefinitized contract action. It's a letter dated October 14th, 2015, and it says: Pending execution of the definitive agreement by the parties, the seller, Fluor, is hereby authorized and agrees to commence work under this UCA starting October 14th, 2015.

This is not some independent work on a different facility on something entirely unrelated to the subcontract. This is them starting the subcontract work under the UCA before the agreement is definitized.

It goes on to say in this, "Upon receipt of the draft definitive agreement, the seller agrees to promptly begin negotiating with BAE." So as Your Honor is aware from the statute, the statute only bars a party from prospectively waiving the right to assert a claim before providing any work

on the project.

And here's the statute, right? So it says, "A subcontractor may not waive or diminish the right to assert a claim in advance -- in advance of furnishing any labor, services, or materials." And then it goes on to say that a provision that does so, that limits their right to assert a claim in a contract executed prior to providing any labor, services, or materials, is null and void.

So the limitation on damages was entered into and agreed upon in the definitized subcontract executed December 17th, 2015. The UCA work that they did prior to that, which is any labor, service, or material that they provided before, that is before they agreed to it. So the limitation on damages as a matter of record fact cannot apply.

The contract itself recognizes the work was done. They plead in their counterclaim that the work was done. They plead -- in paragraph 89 of their counterclaim, Fluor admits that they did work on the NC facility under the UCA. And so what they try to say is, they try to say, "We did it under the UCA but not under the subcontract," and perhaps they're trying to draw some distinction between the two. Whatever distinction they're trying to draw is entirely conclusory and not supported by the contract documents and what is before the Court as a matter of fact in the record. And obviously to the extent their pleading contradicts the exhibits to our

complaint, which are incorporated -- the contract, that is to say, to the extent their allegations contradict the exhibits, the exhibits are going to control as Your Honor is aware.

So as a matter of fact, there is no way this statute could apply in this circumstance. Your Honor should recognize this statute is in derogation of common law, so it has to be strictly construed. When it says, "any labor, services, or materials," it means what it says, any labor, services, or materials. Did Fluor provide any labor, services, or materials? They absolutely did and admit they did in paragraph 89. So Your Honor doesn't have to deal with any discovery on that issue. It is before the Court as a matter of pleaded fact.

And, you know, finally, the other reason the statute doesn't apply, Your Honor, is the statute is about capping damages not about limiting claims. As Your Honor saw, the statute says, "limit the ability to assert" --

THE COURT: No, I think you've got that backwards. You said the statute about capping damages not limiting claims, but that's not true. Your argument is that the provisions in the contract are about capping -- or limitations on damages not limitations on claims.

MR. TREECE: Thank you, Your Honor. That is an essential correction, and you're exactly right. So the statute says you can't limit claims, but it says nothing

about capping --

THE COURT: Is there really any difference there?

MR. TREECE: There's absolutely a difference there, Your Honor. It's the same thing with a medical malpractice cap, right? So you can assert the claim and all aspects of the claim that you may have, but your damages from the claim asserted are capped, right? So you're not restricted in your ability to assert a claim. You're capped in your recovery on the claim you assert. It's the difference between a claim and a remedy, and I know the Court is very familiar with that distinction.

So here's a case that gets to that issue, right? So this is not a hold harmless or anything along those lines. And this *Richmark* case that we've cited, "Limitation of Liability clause, 'did not purport to indemnify or hold architect harmless from damages, simply established a bargained-for cap on liability.'" I mean, it's a fine distinction in the other context, but before the Court it's an appropriate and reasonable distinction because the Court is well aware of the stark difference between claims and remedies.

So more importantly, this is not something that BAE proposed to limit anything Fluor could do; this was a provision that Fluor proposed. So rather than this being the context where a general contractor tries to limit a small

subcontractor from asserting claims before they even start work, this was usually used in, you know, a lien waiver context but -- you know, in practice in the past. This is not that circumstance. Fluor established its contract rights in the first place with this limitation of damages. Again, it's their proposal, and that's a matter of pleaded record. And we've got that in the documents we've provided to the Court in the binder, Your Honor.

In paragraph 114 of their counterclaim they incorporate by reference their cost proposal. And we have provided to the Court in this binder and also in the documents that we've submitted, document 37-1, this is their cost proposal, with excerpts, where it's saying, "Fluor is adding this limitation on damages. Here's the redline." And it has exactly what ended up in the final version of the contract, Your Honor. And they made that change in various locations.

So this is Fluor --

THE COURT: Regardless of who proposed it, it says what it says.

MR. TREECE: Exactly. Exactly. I mean, it does say what it says.

THE COURT: And the statute says what it says.

MR. TREECE: Correct. And the statute plainly does not apply given all of the reasons we've discussed.

THE COURT: All right. Mr. Treece, thank you.

Let's hear from Fluor on the Rule 12(f) issue.

MR. FITZSIMMONS: Your Honor, this is Scott Fitzsimmons on behalf of Fluor Federal Solutions. I just want to introduce some of my team who is with me this morning. Here in the room I have Kathy Barnes. She will be defending BAE's motion to dismiss. I'll be arguing the 12(f) motion and Fluor's motion to dismiss. I also have in the room with me our associate Sarah Bloom, and Greg Wagner is also on the call. He's with our office. We also have from Fluor Jon Conte is on the line here. He is senior counsel with Fluor.

And if I may try to share my screen as well, Your Honor.

THE COURT: Nice so see all of y'all, Mr. Fitzsimmons.

MR. FITZSIMMONS: Thank you, Your Honor. Can you see that, Judge?

THE COURT: I certainly can.

MR. FITZSIMMONS: So Mr. Treece certainly gave BAE's interpretation not only of the Limitation of Damages clause but of the Virginia Code. I know Your Honor has read the briefings. But, quite frankly, what BAE is presenting to this Court is that the Limitation of Damages clause applies to changes, and if in fact the Limitation of Damages clause applies to all possible changes that BAE issued on this project, then BAE could order any number of changes, require

Fluor to perform any amount of work up to whatever cost BAE desired, and then simply stop paying Fluor at $30 million.

Now, under Virginia law, obviously, which the Court has to apply to this contract, the terms have to be not only in harmony but they have to, quite frankly, make sense. And it's simply irrational and absurd to believe that Fluor signed up to perform any amount of work at the direction of BAE, regardless of what change BAE may make on the project, and agree to limit its damages or its recovery to $30 million. It simply is an irrational interpretation of the Limitation of Damages clause that is being presented by BAE.

So I'd just like to start -- Your Honor, you asked at the beginning about the motion to strike. Quite frankly, we'll go into it, but it's the wrong procedure that BAE is seeking. This Court does not grant motions to strike damages in contract claims. Every single case --

THE COURT: Whether or not I do it at a Rule 12 or whether I do it at a Rule 56, isn't your own evidence going to be that it was Fluor's intention that if you-all sued each other then you would be limited to $30 million? That's what's in that e-mail.

MR. FITZSIMMONS: Well, we'll back up just one step, Your Honor. BAE presents without any -- without any support the fact that Fluor presented this Limitation of Damages clause. BAE does not present whether the parties discussed

this clause, BAE does not present whether the parties negotiated this clause. But clearly Fluor did not present the clause that was incorporated into the contract.

THE COURT: Well, I mean, you know, regardless of who presented it, I mean how can you-all in good faith make a claim for $185 million when your own evidence is going to be that, from your own person who is the point of contact on this signed contract, says you're limited to 30 million?

MR. FITZSIMMONS: Your Honor, the e-mail from Ms. Lewis that BAE attempts to rely on I think introduces --

THE COURT: I mean, Ms. Lewis wrote that. I mean, she wrote it. And you look at the contract, and the e-mail is between Lura Lewis and Erin Phalen, they are the two people that are, under Section 2.2 of the contract, are the authorities under this contract.

MR. FITZSIMMONS: So, Your Honor --

THE COURT: I don't know. I'm just wondering how counsel, in good faith, can make a claim for 185 million when your own evidence is going to be you're limited to 30.

MR. FITZSIMMONS: Because that e-mail, Your Honor, invites more questions than it answers. That e-mail that discusses $30 million does not discuss the specific type of damages that are capped to $30 million. They are presenting a cherry-picked, single e-mail that was throughout this multi-month negotiation, and what you will see at the

beginning of that e-mail is they're talking about insurance. Then what is clearly not answered is what damages are capped.

Now, Fluor will not dispute that there may be some damages that are capped, but certainly not related to any changes that BAE may have caused or directed on the project. So the e-mail does not answer whether or not the changes that BAE caused on the project are capped. It simply says that there's a $30 million cap. And, certainly, the cap, as we say in our brief, there may be a cap applicable to personal injury, there may be a cap applicable to environmental claims. And on this project, which was a nitrocellulose project, which is the chemical that is included in munitions, that actually make munitions explode, there are risks on this project. And --

THE COURT: Mr. Fitzsimmons, let me ask you this question: Is there a question of fact, therefore -- from your argument, there's a question of fact as to whether or not this cap applies to changes or not?

MR. FITZSIMMONS: Not only is there a question of fact as to whether it applies to changes, but the fact that Article 46 does not include the word "changes," and the fact that Article 6 (sic) does not reflect what BAE presents -- what BAE is arguing is that Fluor somehow presented a clause and it was incorporated directly into the contract. But Article 46, as Your Honor pointed out at the beginning of this

call, does not include the word "changes."

THE COURT: Right. That's the third one, right?

MR. FITZSIMMONS: It is the third one, Your Honor. So --

THE COURT: So how can the Court -- and here's the question I tried to ask Mr. Treece, and the question is this: Two of the provisions include the words "including all changes," and one provision doesn't, okay?

MR. FITZSIMMONS: Correct.

THE COURT: How is the Court supposed to as a matter of law pick and choose between those?

MR. FITZSIMMONS: Well, Your Honor, it would be our argument that it's clear that the provision does not incorporate changes. However --

THE COURT: Yeah, but --

MR. FITZSIMMONS: -- if the Court finds an ambiguity, if the Court finds an ambiguity, you're absolutely correct that you cannot grant BAE's motion to strike.

THE COURT: Well, how can you say it doesn't include changes when 2.21, Limitation of Damages, says the, "30 million being defined as the value including all changes and the maximum liability for damages"? How can you say it doesn't include changes when it says it includes changes?

MR. FITZSIMMONS: Your Honor, if you look at the beginning of the -- all three of them, all three of the

provisions --

THE COURT: Right. Right. I get your point, "except as otherwise provided in this subcontract."

MR. FITZSIMMONS: That's absolutely correct, Your Honor. But the important aspect of the "except as otherwise provided" language is that the Limitation of Damages clause defers to the Changes clause. And I have the Changes clause up on the screen here, Your Honor. And by deferring to the Changes clause and saying "except as otherwise provided," the Changes clause has a very specific limitation that BAE could have imposed on any particular cost. The Changes clause states that on any particular change BAE could impose a limitation of that specific change. And the Changes clause does not defer to any other -- in fact, the Changes clause says: Except with respect to such limitations that are set forth in the Changes clause, nothing contained herein shall affect the right of the parties to an equitable adjustment.

So whereas Limitation of Damages clause defers clearly to other clauses in the contract by its terms "except as otherwise provided," the Changes clause, which is Section I 1A(3)(j), limits any reference to other contract provisions, and states very specifically. So with that, Your Honor, the two provisions can be read in harmony. The Limitation of Damages clause defers to the Changes clause. The Changes clause provides BAE with an avenue to limit damages and then

states specifically, "Except with respect to such limitation, no other clause can limit damages with regard to changes."

So when Your Honor asked how can the two -- how can the two clauses be read in harmony, that's how the two clauses can be read in harmony. And it was clearly the parties' intent, Your Honor, to remove the word "changes" because it was removed from Article 46. BAE's argument that somehow this clause was simply adopted, slapped into the contract and agreed upon -- in fact, BAE has no source whatsoever for the fact that Fluor proposed this.

So with that, Your Honor, if you look -- and we cite to several cases, *Shepherd versus Davis*, *Route Triple Seven* and *Vir2us*. All of those cases, including the Supreme Court of Virginia, have reviewed limiting language, including similar to "except as otherwise provided," and found that they defer to other provisions. And here we have that exact same situation, Your Honor. So --

THE COURT: Okay. So what your argument is, is that the "except as otherwise provided in this subcontract" requires the Court to defer to this limitation contained in the Changes clause?

MR. FITZSIMMONS: That's correct, Your Honor.

THE COURT: Okay. I understand that, but -- I understand that argument, but if that's true, what does "30 million being defined as the value including all changes

mean"? Isn't that inconsistent?

MR. FITZSIMMONS: As we argued in the alternative, because we believe -- we believe the statute clearly defers to the Changes clause. But as Fluor argued in the alternative, there is an ambiguity. An ambiguity exists. Not only is there an ambiguity between two of the provisions and one that does not have the word "changes" -- and clearly, again, the parties intended to remove the word "changes." Why would they remove it in one and not in the others --

THE COURT: No, I hear you.

MR. FITZSIMMONS: But then you just read --

THE COURT: I hear you on that, Mr. Fitzsimmons.

MR. FITZSIMMONS: Then another reading that could potentially exist, Your Honor, is if you just read the provision grammatically, does "changes" in fact refer to scope of work or does it refer to any changes that the parties may agree to to the $30 million? And in that case, if it only refers to changes to the $30 million, then we're left with a provision that doesn't refer to changes in the scope of work at all. We're left with a provision that talks about $30 million going back to "except as otherwise provided in this subcontract" --

THE COURT: Mr. Fitzsimmons, could you explain that point again? You lost me there.

MR. FITZSIMMONS: Oh, certainly. So the highlighted

section we have down at the bottom where it says, "$30 million being defined as the value including all changes," that language actually -- as we put into our original counterclaim, this isn't the first contract that Fluor and BAE has entered into, and, in fact, they've entered into a number of contracts. They have a boiler project, they had a cutter warehouse, and those projects contained also a limitation of damages provision, except that limitation of damages provision was read as "the value of the subcontract including all changes." So it was the value of the subcontract plus changes. That's how those -- that's how those provisions in those contracts, both the boiler's contract, the federal warehouse, the limitation of damages are read, that it's the subcontract price including damages. So subcontract price plus, plus changes.

This could be read very similarly. It's $30 million including any changes, plus changes. $30 million being defined as the value plus any changes.

THE COURT: What does that mean "being defined as the value"?

MR. FITZSIMMONS: The value would be the value of the limitation of damage for personal injury, for torts, for environmental claims, et cetera. But what it certainly is not is a value that's limiting your changes, because BAE knows exactly where these limitation of damages provisions came

from. And it's $30 million being defined as the value, which I assume BAE argues is the value of the limitation of damages for, as we argue, torts and personal injury, including all changes, because it's very common in the construction industry to have a limitation of liability that is your contract value. And then "including all changes" increases that limitation of damages.

THE COURT: All right. $30 million including all changes you're reading to say $30 million plus changes?

MR. FITZSIMMONS: That's correct, Your Honor.

THE COURT: As opposed to -- but they don't say "30 million plus changes." The contract says "30 million including all changes."

MR. FITZSIMMONS: But "$30 million including all changes is $30 million," as we argue, going back to the very common practice in the construction industry that you begin with your limitation of damages as your contract value and then it goes up with each change. So as BAE directs changes to the contract, the limitation of damages would certainly go up.

So the idea that somehow, going back to the beginning, that somehow BAE and Fluor, or Fluor would even sign up to a contract whereby BAE could essentially order a gold-plated nitrocellulose facility and Fluor would agree to perform all of that work is an irrational interpretation of

this contract. It would allow BAE to run rampant, as it did on this project, and direct -- direct Fluor to perform any amount of work.

THE COURT: Okay. All right. Mr. Fitzsimmons, thank you for that. Tell me why you think none of this matters because it's barred by the statute.

MR. FITZSIMMONS: Thank you, Your Honor. So the limitation of damages provision, contrary to how -- or, I'm sorry. The Virginia Code, contrary to how BAE presents it to Your Honor, is not a mechanics' liens statute. It doesn't apply to private contracts whatsoever. As Your Honor identified, the statute doesn't apply -- doesn't use the word private or public project whatsoever. Under no circumstances does the plain language of the statute state that it applies either to public or to private.

What the limitation of damages states -- I'm sorry, the Waiver clause states is that a subcontractor cannot sign up for and waive its claims for demonstrated additional costs. If it does so, it's null and void. There's no doubt that this statute was effective.

If you look at the legislative history, what BAE argues is that somehow Fluor performed some work before entering into its contract under the UCA. And they go to paragraph 89 of Fluor's counterclaim. Fluor doesn't say or argue that it performed any work under the subcontract. In

fact, what Fluor argues is that it performed work under the UCA.

But this language that BAE lights upon that says "before performing any work," doesn't mean the beginning of the project. Such an interpretation would be absolutely draconian. What BAE attempts to interpret in this statute is that a subcontractor could drive its truck onto a project site, dump off some 2x4s, put its shovel in the ground, then walk over to the trailer, sign the contract, and by putting those 2x4s on the ground and putting its shovel in the ground, that contractor has waived all of its rights to demonstrate additional costs. That can't possibly be the interpretation that the Virginia legislature intended, and, in fact, it's not the interpretation that the Virginia legislators intended. As we argued in our briefing, when Senator Chapman presented this legislation --

THE COURT: No. I think it was -- wasn't it Senator Petersen?

MR. FITZSIMMONS: Senator Chappy Petersen; you're correct.

When Senator Petersen presented this statute, it was originally presented in the mechanics' lien law; however, when it got up to Governor McAuliffe, Governor McAuliffe said, "Wait a minute here. There's a couple of aspects of this statute. Part of it goes in the mechanics' lien law, but part

of it goes into Title 11, which is contracts." So BAE's argument somehow this is a mechanics' lien law and doesn't apply is just absolutely undermined by the legislative history.

And on top of that, if you look at the introduction of this bill by Senator Petersen, he says very specifically that it protects a subcontractor from waiving his lien rights, bond claims, claims for -- or any other rights unless the subcontractor has been compensated for the work or materials related to the waiver.

That language is important, because, historically, BAE refers to mechanics' lien and lien waivers happening on a monthly basis. And the Virginia courts for years have found that in order to confirm a lien waiver, a lien waiver requires consideration. So along with this statute that says clearly that -- as introduced by the author of this legislation, it states that "unless the subcontractor has been compensated for the work or materials related to the waiver." Now, this goes back to the idea of any work performed. The idea, again, that a contractor could put its shovel in the ground and then waive all of its rights to all demonstrated additional costs would be an irresponsible interpretation of this Virginia code. The better interpretation --

THE COURT: But in this case, but in this case, this isn't a case where the contractor came and cut the grass

before starting the work, or, as you say, delivered a load of lumber and put the shovel in the ground. In this case, related to this project, Fluor did a bunch of work under the UCA, which was later incorporated into the subcontract, and got paid millions of dollars. So this isn't a -- let's not put the strawman up there by putting the shovel in the ground. Let's talk about the facts of this case.

MR. FITZSIMMONS: Certainly, Your Honor. So BAE argues that somehow the UCA was incorporated into the subcontract that was executed in December. That's absolutely false. And as Fluor argued in its --

THE COURT: Well, okay, I get that.

MR. FITZSIMMONS: Fluor performed --

THE COURT: I understand. But regardless, going back to the words of the statute, whether the UCA is superseded or whether the UCA is incorporated into it, y'all did work on this project to the tune of millions of dollars before the subcontract is signed. Therefore, doesn't the statute simply not apply here?

MR. FITZSIMMONS: No, Your Honor, because the interpretation of "any work" is not a temporal interpretation. Again, it doesn't mean that a subcontractor may perform any amount of work and then simply waive all of its rights. It's not a time based. The idea of "any work" means any work performed under the contract, whether you're doing work at the

end of the project, you're doing work in the middle of the project, you're building the roof, you're building the walls, you're building changes that may arise on the project. Because a subcontractor, when they first enter into a contract, may not be aware of all the modifications --

THE COURT: Okay. So you're saying I've got to read into this statute "work on this contract"?

MR. FITZSIMMONS: That's what the -- that's what the words of the statute state, that --

THE COURT: Well --

MR. FITZSIMMONS: -- it's work on the contract.

THE COURT: Where does it say "work on the contract"? Help me out there, Mr. Fitzsimmons. Show me where it says "work on the contract," or, in this case, "on the subcontract."

MR. FITZSIMMONS: It says: (Reading) A provision that waives or diminishes a subcontractor's right -- lower-tier subcontractor's, or material... to assert payment bond or his right to demonstrate in a contract executed prior to providing any labor, services, or material is null and void.

So it refers to the contract, Your Honor, in the code.

THE COURT: Sure. Sure. Absolutely, the provision in the contract. The provision in the contract is null and

void unless you provided labor, services, or materials before the contract is signed. That's what this says.

MR. FITZSIMMONS: Your Honor, we would interpret it differently. We would interpret --

THE COURT: Okay. Help me out to understand exactly what you mean.

MR. FITZSIMMONS: We would interpret -- so as Mr. Treece acknowledges, or argues, the history of this clause comes down from the lien waivers. The lien waivers, again, require consideration. Lien waivers come in on a monthly basis after work is performed and when a contractor is compensated.

The idea of any labor, services, or materials does not refer to, again, the contractor who may even do some work. And none of the work that Fluor is requesting costs for is related to the UCA at all. The cost that Fluor is requesting is related to changes that occurred much later on in the project.

The idea of any labor, services, or material defines that this waiver applies to any possible work that the contractor may perform under the contract. It does not establish a timeline. In fact, that was the intent when Senator Petersen introduced this. He said, "Wait a minute. Until you've been paid for this work, you don't waive it."

So that's the history of this. So to the extent that

there's any question about "any labor or material," then it appears that there may be a question of ambiguity in the reading, and then at that point Your Honor is well within your rights to go to the legislative history and see where Senator Petersen presented this. Again, the idea of any labor, services, or material is not a time-based discussion. It's not performing work at the beginning of a project, before you execute a contract, and, therefore, somehow the subcontractor is --

THE COURT: Okay. If you say it's not temporal based or time based -- you said that a couple of different times -- how do you explain the use of the word "prior to"?

MR. FITZSIMMONS: Because, as I mentioned, you can issue lien waivers on a monthly basis. You can potentially issue claim waivers. In fact, when we receive -- it's very common in the construction industry when a contractor is paid for work, that it provides a claim waiver; that once it's been paid for that -- once it's been paid for that work, that it issues a claim waiver and a waiver of additional -- it says to the owner, whomever it may be, that, "You know what? I don't have any further costs related to the work that you have paid me for, and, therefore, I am providing you on a monthly basis, as I get paid, a waiver of my claims for that work for which you have paid me for." That way both parties know that regardless of how the contract ends, that there's not going to

be a dispute with regard to the work for which the contractor has been paid. So that's -- that's what it means, "prior to providing any labor, services, or materials."

THE COURT: Okay. All right. Thank you for that, Mr. Fitzsimmons.

I want to go and ask Mr. Treece a question, and that is this: Mr. Treece --

MR. FITZSIMMONS: I'll stop sharing. If I may, Your Honor, I'll stop sharing.

THE COURT: Okay. Thank you, Mr. Fitzsimmons.

Mr. Treece, Mr. Fitzsimmons started his argument and made a good point about how your reading of this provision in the contract is irrational and would allow BAE to run rampant -- I think those are the words Mr. Fitzsimmons used -- over the rights of Fluor. He says BAE could order all these changes and make Fluor do all of this work and then say, "Too bad, so sad. You're stuck to 30 million." Tell me why that argument doesn't carry water.

MR. TREECE: Certainly, Your Honor. It doesn't carry water because of the plain language of the agreement and the plain language of the clause we're talking about. If 30 million is defined as the value of all changes, and BAE says, "Go make a gold-plated centrifuge," I think, or something along those lines I think was his example, Fluor could say, "We're going to do $30 million worth of work on a

gold-plated centrifuge and no more. Try to recover from us, because $30 million includes the value of all changes. You just directed us to do $30 million in gold-plated changes. That's our maximum exposure. We're doing $30 million; try to sue us for more. You can't get anything." That's what they would say to us, right?

Their arguments are totally untethered from the language of the agreement. If you look at what they're proposing, if they want to strike changes and they claim that the Changes clause somehow overrides this language, that's just not possible, because their construction would require the Court to say, "30 million being defined as" and strike the entirety of "value including all changes" and the maximum value of liability for damages. BAE is the only party that has a consistent construction. Again, the absence of a definition a third time in Section 46 is in no way contradictory, directly --

THE COURT: Let me go back.

MR. TREECE: Yeah.

THE COURT: Let me go back to the question I asked, because the question I asked, your argument seems to agree with Mr. Fitzsimmons, and that is that this contract, as you read it, would allow BAE to order $60 million in changes; Fluor, under the contract, would have to make those changes; and then BAE would only have to pay them 30 million.

MR. TREECE: Answer me this, Your Honor: Why would Fluor do that when Fluor's exposure is limited to 30 million being defined as the value of all changes? Why would they do 60 million in changes --

THE COURT: No, that's not the question for the Court. The question for you is, isn't that -- isn't that reading of it just irrational?

MR. TREECE: It is absolutely not irrational. And more than that, it is what Fluor proposed. Mr. Fitzsimmons says that we have no evidence that Fluor proposed this. To the contrary, based on what they incorporated by reference in their complaint -- and this, again, is docket 37-1; it's before the Court, and this is Fluor's redline. It says, "See attached redline document below." Fluor has included a statement on the limitation on damages below. They added this. They introduced this redline all throughout.

I'm actually a little stunned that Mr. Fitzsimmons is referring to contracts other than this one, because he well knows that those contracts do not have this language. He's referring to a package boiler contract that has language about the value of the contract plus changes. That's what the plain language says, "value of the contract plus changes." This --

THE COURT: Is that the case that Judge Dillon has?

MR. TREECE: That is the case with Judge Dillon.

And I'm a little stunned by the false equivalency

between the two, because he well knows that this language is entirely different, and it's Fluor's own proposed language. I would invite the Court to look at that and then assess the credibility of that argument, Your Honor.

THE COURT: Well, I've got plenty to look at by looking at this case alone.

MR. TREECE: Understand. Understand. Now, Your Honor --

THE COURT: You-all have given me plenty to look at here.

Okay. I think I have a pretty good idea with regard to this argument. What I'd like to do now is turn briefly to BAE's motion to dismiss Fluor's counterclaim, and there are really three parts to that.

MR. FITZSIMMONS: Your Honor, if I may make one comment about our last -- I just want to refer Your Honor --

THE COURT: Sure, Mr. Fitzsimmons. Go ahead.

MR. FITZSIMMONS: I just want to refer Your Honor to the arguments that we made in our brief with regard to the contract prohibiting Fluor from stopping performance. The contract is very clear that --

THE COURT: That's why I asked the question of Mr. Treece, because I noted that from your brief.

MR. FITZSIMMONS: Thank you, Your Honor.

THE COURT: Give me a big picture, Mr. Fitzsimmons.

Tell me how you-all got stuck with this $185 million in changes. Tell me how that came about. What's the nature of how that happened?

MR. FITZSIMMONS: It's actually a good segue into the next briefing, Your Honor.

THE COURT: All right.

MR. FITZSIMMONS: So, fundamentally, BAE provided Fluor with a design, and you'll hear about this in the argument, and that design was known as the Lauren design.

THE COURT: Right. I got that. I got that.

MR. FITZSIMMONS: That design was prepared by a prior subcontractor to BAE. And then during the project -- or during solicitation, as we put into our counterclaim and we put an exhibit in, BAE directed Fluor to bid to the Lauren design, and, in fact, derided Fluor on its price, proclaiming that the design was 85 percent complete.

And so not only did Fluor bid to the Lauren design as directed by BAE, the contract states clearly that Fluor was obligated to adhere to the Lauren design. The Lauren design was initially native files, it was -- it was what's called a Smart Plant model, an electronic model, and BAE represented in the contract that they had redlined, they had corrected, they had provided updates to the design.

And then we also have to remember that there's a second aspect of this, and that is the process design. And

you'll hear about this from Ms. Barnes. There's no doubt that under this contract BAE was responsible for the process design.

You think of the process, Your Honor, as the black box that really controls the entire NC facility, right? It's huge thousand-gallon tanks. It is where the nitrocellulose comes in like Saran wrap and it gets cut up, and then it gets into these acid tanks, and it goes through this system and it goes to stabilization tanks. It's a huge chemical process.

BAE was responsible for that process and responsible for providing the equipment for that process. And during the project, BAE fundamentally changed that process, the underlying process. And as BAE put in their complaint, the underlying process controlled the web of piping that was to be constructed in the entire NC facility. And Fluor's costs arise largely but not primarily from that piping as a result of BAE's changes to the process design.

So included in Fluor's counterclaim are design changes that were specifically directed by BAE. One example we put into our counterclaim, and only one example was we included a letter whereby BAE directly required Fluor to use a specific valve, thereby controlling the equipment that Fluor was to use. After Fluor had already spent money on an equivalent valve, BAE came in and said change that valve. That's a $5 million change.

Another example, when BAE changed the process design, it increased the heating in the facility. So the heat in the facility just changed. That required a change to the HVAC system in the NC facility. That was a direct and proximate result of BAE changing the process design.

So we had process design changes, we had directed changes, such as the valves, and then we had tremendous delays while BAE was negotiating and changing its process design with its proprietary designer, a company named Bowas, who was providing this underlying process. There were tremendous delays that occurred on this project as a result of Fluor waiting for BAE to change and decide what it's doing with its process.

Then we fundamentally have the Lauren design that was represented by BAE during a solicitation period and in the contract to be 85 percent complete. And so there's an aspect of Fluor's damages that are related to an implied warranty and specifications. Set aside whether it's 85 percent complete, it just wasn't fit for its purpose. There were clashes.

This is after BAE represented to Fluor in the contract that the Lauren design was redlined, the Lauren design was corrected, and Fluor was obligated, as you'll see and Ms. Barnes will put up, obligated to adhere to that Lauren design. So all those culmination of changes and that sort of a bowl of spaghetti between BAE's process design and the

piping, that's how all of these -- and Fluor was submitting what's known as proposed change notices or changes to BAE timely, as we set forth in our counterclaim. We were timely presenting to BAE each of these changes in a timely basis.

THE COURT: Well, BAE says, "You're not entitled to any these changes because we never agreed to them."

MR. FITZSIMMONS: Certainly, Your Honor, that's a self-serving -- that's a self-licking ice cream cone, Your Honor. The only one who controls whether or not BAE agrees whether or not it's a change is BAE. So under Virginia's prevention document, if BAE is the only one who can agree whether or not it's a change, and BAE is the only one who can issue the written change order -- the reason we are here, Your Honor, is because, fundamentally, the parties disagree as to what's within or outside the scope of the project. And it's our argument --

THE COURT: Right. No, I get that. And I carefully looked at the scope of work yesterday; I focused on that.

But going back to what we were talking about earlier, Mr. Treece says Fluor never would have done more than $30 million in work on all these changes because they knew their liability was limited to that. Fluor never would have done that. But you're saying, "Now, wait a minute. We did 185 million."

MR. FITZSIMMONS: Your Honor, not only did we perform

185 million, but going back to -- going back to the provision, again, we couldn't walk off the project. It's clear, and I had it on our slides and I sent it to you and Your Honor has seen it, the clause clearly states Fluor can't walk off the project. So -- and it also goes to how Fluor -- intent and their understanding of the clause.

Now, so fundamentally, Your Honor, what BAE is trying to say is, "Well, if you disagreed, you should have walked off the project. Oh, and by the way, BAE is the only one who can control whether this is a written change, and you never should have performed it without a written change," when BAE was the only one in control of whether or not they could issue a written change.

So if I'm BAE, of course I'm going to say nothing is a written change -- nothing is a change. And why would I agree that anything is a change, right? Because they're not going to sign up and admit, as they should properly, that in fact they were impacting Fluor's costs through changing its process design, in providing Fluor with what was represented to be a corrected and redline design, requiring Fluor to adhere to and use that design on the project, and then, you know, stepping aside and saying, "Well, nothing is a change. And by the way, since I didn't issue you a change or approve this, then I'm not liable for it." I mean, that's just a self-serving argument if I've ever seen it. The only one who

was in control of determining that BAE believed it was a change was in fact BAE.

I'll stop there, because Ms. Barnes, I didn't want to steal her thunder, but you asked me a question, Your Honor.

THE COURT: Well, no, you said you wanted to say something else so I gave you that opportunity.

MR. FITZSIMMONS: That's fair.

THE COURT: I've lost track of where we are on the motion to dismiss filed by -- it's a motion to dismiss filed by BAE, and so I think, don't we have to hear from those folks first?

MR. FITZSIMMONS: Yes, Your Honor. So that would be Mr. Treece, I believe.

MR. TREECE: Are you ready, Your Honor?

THE COURT: Yes, I'm ready.

MR. TREECE: All right. Let me share my screen again.

All right, Your Honor, while I appreciate Mr. Fitzsimmons' narrative, it is grossly misleading and in no way based on the contract, as I'll walk the Court through, and so would correct all of those misstatements.

So but before I do that, I want to just kind of give the Court a little background on the basic ordering agreement. So BAE is, of course, the defense contractor that operates the arsenal. The Army has a basic ordering agreement with BAE

where they basically say, "Here's something that we want done at the arsenal," and then the task order too was directed to the NC facility. Now, in connection with that task order, the Army, not BAE, selected the proprietary nitrocellulose manufacturing process system by Bowas, which is spelled with a W as B-O-W-A-S and is based in Austria. And the Army's technical bid package required the use of the Bowas system. I know Mr. Fitzsimmons likes to claim that's, you know, BAE's system, and I understand sort what he's trying to say, but, ultimately, it was the Army that selected and dictated the use of that system.

And one thing on the 12(f), just to jump back, we're not dealing, Your Honor, with anything relating to lien waivers. The only reason we've raised a lien is in connection with the interpretation of the statute itself. But liens are not at issue here. Fluor, for example, can't put a lien on the Army's property, right? So that again goes to the inapplicability of the statute to the issue at hand.

But back to the motion to dismiss. In 2015, BAE hired Fluor to do the actual design and construction of the NC facility. This is a design/build contract. You'll see a lot of cases by Fluor --

THE COURT: Let's just go there, okay? Is there a question of fact that the Court need -- in applying the *Spearin* doctrine, right, which is their implied warranty of

design, right, is there a question of fact as to who is the designer here?

MR. TREECE: Absolutely not.

THE COURT: They say you're the process designer and you're the designer, and you say -- and they say, "We had to follow Lauren Engineering, and it was 85 percent done, and there was a misrepresentation." And you say, "No. No. No. They're the designer." How can the Court resolve that on a 12(b)(6)?

MR. TREECE: Your Honor, fortunately the contract spells this out clearly, so that is how the Court can make this determination, because the contract assigns all design responsibility to Fluor, ultimate design responsibility. All design responsibility that is at issue in their counterclaim is plainly assigned to Fluor under the contract.

Let me just walk the Court through the contract provisions that are relevant to that issue. So it begins with a statement of work. Of course, it says, "Statement of Work. Subcontractor shall provide all necessary facilities, equipment, materials, et cetera, to accomplish the Statement of Work," right? And then it says the price is not subject to adjustment. So you can't have a change order if you're doing something under your Statement of Work, right?

So then we look to the Statement of Work. The Statement of Work says it's to design and construct NC

facility. So they weren't hired to take plans that were completed plans and go and implement those. The Lauren drawings are not a requirement under the contract. That is clear on the face of the contract, and I'll walk the Court through how that is clear on the face of the contract.

The Lauren drawings are for reference only. It says: Subcontractor shall prepare their own drawings. Subcontractor shall prepare their own specifications, own construction specifications. It is incumbent on the subcontractor to perform their own analysis. And then, unequivocally, subcontractor shall be solely responsible for the design, not the process design, not the electrical design, not the piping design. "All design." "Solely responsible for the design." Subcontractor is responsible to validate, correct, and complete all PFDs.

Essentially, what happened here, Your Honor, is Lauren is gone from the project. Everything Lauren did was turned over to Fluor in the eight-month bidding process. It was turned other to them as is and for reference only. And it is essentially saying, "Look, somebody else was on this project, they did some work. You look at it; if you can use anything there to save on cost and expense, by all means do it. But if you can't use it, you have to look, you have to validate, you have to complete. You're ultimately responsible, but here's information that you may or may not be

able to use. Use who you want at your own risk."

Spearin does not apply because they are extremely clear assignments of liability to Fluor, and disclaimers, and there's express warranties that Fluor gave over the design here. *Spearin* cannot apply on the facts of this case. And any of the authorities they cite in Virginia are not design/build contracts. They're talking about contracts where somebody is just hired to build not to design. This is a design/build contract and Fluor is solely responsible for design.

Merger clause, we've talked about that. But they rely on their proposal, and they say, "Well, maybe the Lauren drawings are not clearly required by the contract, but if you look at our proposal, you'll see that we referenced it," or "If you look at our post contract submissions, you'll see that we referenced the Lauren design."

The problem for them is none of those are part of the contract. It supersedes your proposal, right? So whatever they're putting out, whatever their characterizations, that's not the agreement. They cannot vary or modify the terms. With their post contract submissions, even there they're responsible for any error or deficiency which may exist in the submitted designs. They have the responsibility for all errors and deficiencies in the design.

And, I mean, clearly BAE shall not be liable for any

of Fluor's increased cost or performance that would result from Fluor's implementation of changes that BAE did not first approve in writing. Fluor's response, if they don't get approval from BAE, is to not do the work, and say, "No, we're not spending money to do that until you approve it, because we don't have an obligation to do anything that you don't first approve."

So Fluor's assertion, which is misleading, based on having to do all this work without a written approval, they did not have to do the work, and they're instructed not to do the work without approval. So that's the issue there.

Now, it was expressly a conceptual design, right? So they're getting something they knew was not complete, and they knew they had to validate, correct, and complete it.

So I want to break this apart, Your Honor, because this really isn't a single count breach of contract. And the *Consilio* (phonetic) case that they cite, which is not a design/build case, it's just a design case, so it's inapplicable as to the *Spearin* issues, but what's relevant in that case is in that case the parties correctly broke out an implied warranty claim from an equitable adjustment claim. Here Fluor tries to do an artful pleading and dump basically three claims under one count. But these are all independently subject to dismissal.

But I want to conceptually break it down for the

Court into, really, two things that we're talking about. We're talking about the Lauren design, which is drawings, right? It's the 3D model of, as Mr. Fitzsimmons represents, the spaghetti of piping and everything else.

The P&IDs are not that. The P&IDs are base level schematics that just show this component is connected to this other component, right? But the Bowas equipment was delivered to a warehouse, right? So Fluor retrieved it from the warehouse, they were responsible for installing it in the facility and doing all of the -- all of the web of piping that goes with it. That is fully and completely their responsibility.

So you've got the two issues: You've got the Lauren design, which is drawings. You've got directed or constructive changes. To be a directed or constructive change it has to be outside the scope of work; otherwise, it's you doing your scope of work. And as we know from the contract itself, they're not entitled to any increase in the cost of work that is within their scope of work. And then we've got two extra contractual claims I'll kind of discuss at the back end.

So anything relating to the Lauren design is entirely not a viable claim and should be dismissed on with a motion to dismiss, because the contract -- the four corners of the contract assign all relevant design responsibility to Fluor.

That's to say all design responsibility they take issue with is all within Fluor's ambit. It does not require adherence to the Lauren design, and there is no percent complete representation. In fact, contrary representations are in the contract, as we'll get through. The direct and constructive changes I'll talk about a little bit later.

So with respect to the contract and design responsibility, there's a definition of work, and the definition of Fluor's work is all of the design. All of the design, that's Fluor's work. "Contractor shall be totally responsible for all design drawings and specifications."

Here's something that the Court really has to appreciate and Fluor tries to glaze over, right? There's drawings and then there's equipment, right? So there's equipment, the Bowas system, essentially, and then valves and materials and things. Those are not drawings, right?

So this says in the Statement of Work this is a conceptual design -- this says, this is a conceptual design developed by LEC. So they knew it was conceptual.

Now, in the industry, and I believe Fluor represented something along these lines, conceptual means something on the order of 30 percent or 35 percent. The Court doesn't need to reach that. The Court just needs to understand that the plain meaning of conceptual is that it's not a design that you can go and take and implement in a build contract. They have to

design it, right? They get something conceptual, they can use it in a manner they see fit, right?

Then it goes on to say there are drawings, specifications, and technical documents in Appendix G. Three different things: drawings, specifications, and technical documents. The drawings, which are the Lauren design, provided for reference only, plainly stated. Subcontractor shall prepare their own drawings to be used for design review submittals.

So the drawings, Lauren design, are for reference only. Specifications, which are equipment only and -- equipment and materials, are in native word files. These aren't design files; these are native word files, right? So they're different from the Lauren drawings in Appendix G and represent minimum requirements.

So the equipment and materials are the minimum requirements. In other words, if you've got a valve that can handle a certain psi, you might be able to go above that psi, but this is the baseline requirement for that valve, right?

And it's interesting that what they try to use to say that they were required by the Lauren -- to use the Lauren drawings or Lauren design is this minimum requirements. This is a red herring and -- excuse me. This is a red herring and misleading because they well know that the only minimum specifications are with respect to equipment and materials,

not any drawing.

And, in fact, the example they give in the brief and the example you just heard from him, he gives an example of valves, right? They try to say, "Well, we tried to change this valve." That plainly shows that the Lauren drawings and specifications for equipment are fundamentally different, right? So subcontractor, even despite the fact that these are sort of baseline requirements -- so it says, "You have to have at least this level psi for a valve. You can go above that, but here's the base" -- they still have to prepare their own construction specifications.

It's incumbent upon subcontractor to review the documents, that it perform their own analysis. And subcontractor shall be solely responsible for the design we talked about. Subcontractor shall validate and complete all PFDs and P&IDs. So PFDs are process flow diagrams. That's a very high level of here's what machine is going to connect to what machine. The P&IDs are the piping and instrumentation diagrams. And, again, those are just schematics; that's not the design per se. The design is kind of like that 3D model, which is totally independent of the specifications and are for reference only.

In any event, they have the obligation to validate and complete. That means correct, which makes sense because they are designing this facility. So they're not required to

use the Lauren design. They can decide to use some aspect of it if it's a cost savings or beneficial. At the end of the day, that's their decision because they are the expert hired to perform the design and build.

Appendix G-10, which they reply heavily on, totally disposes of their argument that they have to somehow adhere to the Lauren design, which they knew was incomplete. Appendix G-10 is titled "Equipment Specifications," and that's referring to various equipment and materials. Appendix G did not require the use of the Lauren design, which is why they contort themselves to try to cite to their own proposals precontract or their own submissions post contract to try to say, "Well, see here and here, we're talking about the Lauren design, so it has to be in there as a requirement." It is not in there as a requirement.

And if there's any dispute, their technical proposal, which is not part of the contract, recognizes their responsibility to validate the existing design status, except ownership of the existing design, correct and complete existing design for all aspects of the project. So that's what they're intending to do. This is not part of the contract, but they know that they're getting information that is incomplete, and they know that it's their duty if they want to use any aspect of that -- of that, excuse me, to complete it.

Now, they refer to these "Design After Award" documents. They call it the Statement of Work. It's not the Statement of Work, and we flesh that out in the slide that you can look at, Your Honor. And then they selectively quote from that in their counterclaim.

In paragraph 149, they omit the operative language, right? So this essentially says that, you know, BAE's review doesn't relieve them from their design responsibility. They omit this bolded language "or limit the subcontractor's responsibility for design." They omit that. They try to say -- they use that to say a subcontractor -- excuse me. Subcontractor's, excuse me, accepted proposal to try to fold in their proposal with this contract.

Their proposal is not part of the contract, and Part 4 makes that clear. (Phone ringing.) Part 4 makes that clear, Your Honor, because it outlines what is discussed with respect to any proposal that's incorporated, and it is a different proposal than any of the ones referenced in their counterclaim. In fact, it is just cost spreadsheets. And if you look at Part 4, "Attachments," Exhibit I is a proposal dated November 25th, 2015. What they allege are their proposals in the counterclaim are none of those that are dated November 25th, 2015; they're ones dated prior, and that's in paragraphs 115 and 116. So it's plain that their proposals are not part of the contract.

Even if you look at this design specification document that they do rely on, which is not the Statement of Work, it goes on to say the same thing we've been saying and the same thing the rest of the contract says: "Subcontractor is responsible for all specifications." They're responsible to provide 100 percent design. They're responsible to update, finalize, and present design analysis.

You know, I know that Mr. Fitzsimmons has spent much of his time trying to separate process design and claim that BAE had some responsibility for that, that somehow it impacts the analysis here. That's not the case at all, Your Honor. This is the subcontract document, right? This is the milestone schedule, Subcontract Exhibit F. This is Fluor's milestones, and this is payment they get for the milestones.

So they're getting $10 million for process design, and they're getting $10 million for process design over the span of an entire year. And it says there's an engineering kickoff meeting at the beginning, December 2015, and then they begin a 60 percent process design, right? So they're trying to say, "We thought it was 85 percent." That's plainly not in the contract. It's a fully integrated agreement.

But what the contract does say, they're not even at 60 percent, because they're going to begin 60 percent at this date and they're getting two-and-a-half-million dollars to do that. And then by June of the next year, they're going --

they will have the 60 percent process design complete, and then go through 90 percent, and then, you know, nearly a year later they'll have an issue for construction process design.

So Fluor is trying to skirt its process design obligations when they know they're solely responsible for the design, and the subcontract itself -- this is Exhibit F to the subcontract -- plainly recognizes Fluor's responsibility for process design.

If we go back, the contract elsewhere recognizes that process design is expressly within their scope. Subcontractor is responsible for the following process: engineering and design. Subcontractor will revise, which means correct, all PFDs and P&IDs based on the redline documents. Validate existing redline PFDs. Subcontractor shall develop interfacing systems. They're responsible for all of that web of piping they're talking about. They're expressly responsible for that.

And so if we move further down this, Your Honor, when I talked about the 60 percent process design moving forward to 100 percent, the Court may sit there and think, "Well, why is it starting at 60 percent? Is there a representation that it's 60 percent complete?" No, there's not, because this is part of Fluor's document. This is excerpted; it's a screenshot.

This is just how Fluor posed doing the design work.

They said, "We're going to do 60 percent and 90 percent peer reviews." So there's not a, you know, 30 percent review or 50 percent review. It starts at 60. And then the milestones where they get paid are based on this 60, 90, and 100.

So they plainly had the design responsibility for the process, and what they're trying to do now is shift that responsibility in a way that is untenable based on the plain language of the agreements. And we kind of flesh out what we flesh out in brief where they can't rely on any precontract representation or their own cost and technical proposals that are issued after the fact, or their post contract reviews. And we've talked about this in terms of them being responsible for any error and deficiency regardless of what they may submit for review to BAE.

So, Your Honor, the reason we're here on the motion to dismiss is because the four corners of the contract do answer this question. You know our position with respect to them seeking cost overruns not really changes. But, you know, Fluor guarded themselves against this risk, right? When a contractor in this circumstance enters into a fixed-price contract, they are assuming the risk of underbidding, right, and so they have to be careful in that process.

They were paid, as Your Honor saw, for Mustang to do 500 hours worth of work in advance of signing this contract. So whatever they may have needed to do, they were paid to do

in advance of signing this contract. But they also negotiated a contingency, a $14 million contingency fund that says, basically, if there's anything unforeseen here, you can use $14 million, and Fluor ultimately gets to decide how to use that $14 million. So they guarded against the risk, and now they are stuck with the terms of their contract despite their arguments now.

Spearin doesn't apply here, Your Honor, for numerous reasons, the first of which is the subcontract here goes far beyond any general disclaimer. It required Fluor to perform its own analysis, submit its own design and drawings and specifications. And the two critical cases that we provide for the Court *Modern Continental South v. Fairfax Water Authority*. And there the Court recognizes that *Spearin* wouldn't apply where the contractor is required to review for defects or ambiguities. We've demonstrated that's their obligation. I've got another slide on that.

In *McClain* -- this is a Virginia Supreme Court case and dispositive of the issues here. That was a case -- that wasn't even a design/build case; that was just a build case. But even in the build case, the County gave bridge plans to a contractor and it was a tension bridge. It turned out they didn't have enough space to erect the bridge, and the contractor was ultimately held responsible because they agreed to check the dimensions of the structure, so add the

obligation to validate. Here we go far beyond that. They have obligations to validate, revise, correct, all of those things, Your Honor.

And let me just get to the warranty, right? This entirely disposes of any purported *Spearin* claim under the contract. The warranty says, "In addition to any other warranties in this contract, contractor, Fluor, warrants the work is free from any defect in design furnished." They have -- they're granting that ultimate warranty, right, and that distinguishes every single case that they cite.

And then it goes on to say, "Contractor shall remedy at contractor's expense any defect." And then it goes on to say, "any defect in the design furnished," right? And then it says, "Omissions from drawings or specifications necessary to complete -- or necessary to carry out drawings and spec shall not relieve contractor from performing as if fully and correctly set forth. Contractor shall check all drawings furnished to him immediately upon their receipt, compare all drawings, verify the figures, be responsible for any errors. Contractor shall be responsible for all measurements, and his review in no way relieves contractor for any errors or deficiencies."

In that sense, Your Honor, what they got is an "as is" -- expressly as-is information from Fluor -- from, excuse me, Lauren based on work in progress. Everything was turned

over to them. They're the experts. They were paid 500 hours for Mustang to look at this. And it is essentially telling them, "Look, you're the experts. Here's what's been done. If you can realize any cost savings by utilizing this, you know better than we do, you figure it out. You have that responsibility; we don't." And that's, really, the dispositive issue within the four corners of this agreement, Your Honor.

Let me --

THE COURT: Let's go ahead and hear what Fluor has to say about your motion to dismiss. And I don't need to hear argument on the good faith and fair dealing or the *quantum meruit* in the equitable argument.

Let's hear from -- let's hear from Fluor. I understand your point, and what I'm struggling with is, based on what Fluor has submitted, is there a question of fact as to the design responsibilities in this case and whether *Spearin* controls? Let's hear from Ms. Barnes.

MS. BARNES: Your Honor, I think, and I'm not sure whether this is a real misunderstanding or not, but what BAE and Mr. Treece seem to have confused here is that Fluor is not running from any of its responsibilities for the completion of the Lauren design. Fluor is not running from its responsibilities to deal with this web of piping that is specified by BAE's process design. What Fluor is saying is

that in the handshake between BAE providing its process design requirements and Fluor attempting to integrate those requirements in its design, the defects and the changes in the BAE process design caused increased costs and delays to Fluor. And under *Spearin*, there is an implied warranty of specifications that when BAE provides its process design to Fluor, it is saying to Fluor that, "You can take this design and do your work because this design is accurate, and this design that we are giving you will allow you to do your work."

THE COURT: But what about all those things that Mr. Treece just went over which says Fluor is solely responsible for the design? Doesn't the contract itself undo this implied warranty claim?

MS. BARNES: No. In every contract that you will see, you will see that the contractor, if the contractor is doing the construction or a design/build contractor, is going to be solely responsible for the final design. That does not have anything to do with the implied warranty.

THE COURT: Well, that's not true. That wasn't in that *McClain* case where they applied *Spearin*. There wasn't language in that contract that said the contractor was liable for the design.

MS. BARNES: In the *McClain* case, the contractor was liable prior to the execution of the contract and during the bidding to verify and go out to the site and look at the --

and look at the dimensions and the measurements. We have nothing like that here.

We have no responsibility to, prior to the subcontract execution, do any verification, any validation, anything, because, very frankly, BAE was continuing to do their amending, correction, and completion of the -- or correction and updating of the Lauren design as we were doing our bidding. The only time that Fluor had any requirement to validate or complete the design was after the subcontract was executed.

So *McClain* doesn't have anything to do with it and neither does the case where they're talking about that the parties discussed the errors that they expected to be in the design. Well, if you already know from discussions with the party that is giving you the design that there are going to be errors in it, then, yes, you're responsible for those errors. But we don't have anything like that in this case. In fact, what we do have is an opposing party in BAE who put in the Statement of Work that we were given at the solicitation that the Lauren design has been updated, corrected, and amended. So not only didn't we get that design as is or for reference only, that design was represented in the contract to have been updated, amended, and corrected.

I'm going to put my presentation on the screen because I think that we -- there is some information that we

do need to talk about.

I think at this point we're going back to the fact that BAE is now arguing that they are not responsible for the process design. So we've had a real journey in this case talking about who is responsible for what.

THE COURT: Yeah, is there -- and as regards this issue, is there a question of fact that precludes the motion to dismiss?

MS. BARNES: Yes, because if BAE is now saying that they're not responsible for the process design, then I think that there is a question of fact as to where the responsibility ends, where BAE's responsibility ends, that they admit not only in their complaint and pleadings, but also in their reply brief, finally, and in later briefs for the motion to stay that were submitted to this Court.

THE COURT: All right. So, Ms. Barnes, help me out, then, and point out to me where that disputed issue of fact might be with regard to the responsibility for the design. Because I read your presentation, the 70-page slideshow this morning, and I appreciate y'all doing this -- oh, and let me ask you, each side, to go ahead and docket your slideshows, okay? Just docket them as presentations, you know, just, you know, slideshows or PowerPoint presentations for use of the Court. Because they really are another set of briefing, right? It's just briefing with bold and highlighting and

underlining; that's all it is. And I appreciate it, because it, you know, in getting ready for this argument and reading the briefing helped you-all crystallize your thinking on this. So I find these PowerPoints really helpful. So if y'all don't mind, go ahead and just docket them afterwards.

Ms. Barnes, what I was asking you: Where is, in these agreements, any question of fact as to responsibility for the design? Because Mr. Treece says it's all on y'all.

MS. BARNES: Okay. Well, let me just talk a little bit about what the process design is. And we have descriptions of the process design not only from BAE but also from Fluor. Fluor talks about the fact that in its counterclaim, at paragraphs 37 and 38, that BAE selected, procured, and provided the proprietary equipment system which they represent to be a state of the art system that controls the overall NC facility process and includes the system for nitrocellulose transfer and throughput. And that means that what BAE did was it determined the manufacturing process with its subcontractor as how this nitrocellulose would be prepared.

In BAE's complaint, it talks about the complex design is the process design that includes the web of piping and equipment system necessary to manufacture the NC, this nitrocellulose. This is what we are saying is BAE's responsibility. The process design is critical, because it

described the detailed layout of the complex web of piping required by the project.

Now the reason why this issue and who is responsible for this process design is very important is because there is a handshake. And what our claim is, because it comes right out of the contract, is that what BAE does is it determines what the manufacturing process is and then Fluor has to build the systems that house this manufacturing process, and Fluor has to build the web of piping and design the web of piping that integrates these processes, that connects these processes that BAE designs.

And so when Fluor says that the BAE design was defective and it changed, it's because Fluor was unable to use the design that it was given to design this web of piping and to house the buildings that house this process. In the time when Mr. Fitzsimmons took all my thunder, he talked about the fact that Fluor's responsibility is to build the facilities around the equipment and the process that BAE designs, and that where BAE changes the equipment, makes it bigger, makes it stronger, makes it have more energy -- I'm thinking of maybe a car, if you have an engine and you're going to go from a V8 to a V12, there are a lot of things that have to change in the interior, in the skin that -- the exterior of the car, how the car has to run, because of that change in the engine. And so what we are saying is that BAE continued to change the

engine of this process throughout the project, which meant that Fluor had to redo its designs, had to redo that spaghetti dish of piping in order to connect to the different equipment that was changing that BAE provided.

And so BAE wants to claim that they have no responsibility for that and that somehow Fluor has the responsibility to specify the equipment, and that even if there are changes, that BAE has no responsibility.

But the contract has the Changes clause and the contract says that if there are changes, whether direct or constructive, that Fluor -- and Fluor is impacted, and its costs, and there are delays, that Fluor is entitled to an equitable adjustment. And so BAE can't run from that simply by, you know, confusing words and, you know, misstating what the subcontract says and shortening sentences with ellipsis to try to act like Fluor is somehow responsible for the process design.

Fluor has to house the system and has to connect the system in the web of piping, and that is what it is there to do. When BAE makes changes to the process, makes changes to the size of the equipment, makes changes to how the equipment functions, those changes impact Fluor's obligations and Fluor's design. And in this case, what Fluor is trying to do is to get the equitable adjustments that the Changes clause mandates that they're entitled to because of the changes that

BAE made to the process design, the delays that were caused by these changes. And so that is the process design.

THE REPORTER: I'm sorry, this is the court reporter. Judge, can I have a minute? I just need one minute. Judge, are you there?

THE COURT: Yes, I'm here.

THE REPORTER: Judge, can I have just one minute?

THE COURT: Yes.

THE REPORTER: Sorry.

(Discussion off the record between the Court and the court reporter.)

THE COURT: Okay. I don't know who is doing it, but somebody is recording this presentation, because I can see on the bottom of the screen these words as I'm speaking them. The court reporter just communicated with me to say that she wasn't doing it, and it would be in violation of the court's rules for anybody else to be recording this particular hearing. That's not what we're supposed to be doing, and -- because there's only one recording that is being made of these proceedings, and that is the official court reporter. And so I don't know what's going on or who is -- I can still see it, and it seems to me it's coming from your end, Ms. Barnes, because it was only coming up while you were presenting.

MS. BARNES: Okay. Let me see if -- yeah, I don't have record on.

THE COURT: I don't know what's going on with regard to that, but, look, I understand the issue with regard to this Rule 12(b)(6). I understand it very well, and it's set out in the briefs and these presentations/slideshows.

BAE says Lauren doesn't apply because it's a design/build contract and Fluor is responsible for the design. Fluor says, "No. No. No. BAE is responsible for the overall design and we just have to do our implementation of the overall process design." I understand the arguments on the 12(b)(6) and I thank you for them.

Let me now hear from --

MS. BARNES: Your Honor, could I just have one more thing to say?

THE COURT: Sure. Sure, Ms. Barnes, absolutely.

MS. BARNES: Okay. I really want to -- I think I really need to say in case there is some confusion that I have caused, because Fluor is not trying to run from its responsibility for the final design.

What Fluor is saying is that BAE provided a design, and obviously there is a dispute as to whether or not that design was a 60-percent design or an 85-percent design, but I think there can be no dispute that the contract said that that design was updated, amended, and corrected.

There also can't be any dispute, but I guess there is a dispute, as to whether or not Fluor was allowed to not use

that design. Fluor believes we were required to comply with the Lauren design, so there is a dispute about whether or not you could elect to use the Lauren design.

Fluor was required to take the information from BAE's process design and then take the Lauren design and complete that design, and complete the work on the project. The final design documents are Fluor's. The final process documents are stamped by BAE.

Fluor has a warranty for the final design documents. If something is wrong in the design of the nitration building, Fluor's warranty says that those design documents have to be correct and have to conform to the specifications. The Lauren design is the specifications, and that design was provided to Fluor in native form so that Fluor could reference those designs when it prepared the final designs.

Fluor was required to validate and complete. If there is no design that we have to use, there's nothing to validate, there's nothing to complete. So the fact that the words of the contract say you must validate and complete, it means that there is something that BAE provided to Fluor to use, to validate when the contract was signed, and then to complete.

And I have to say that this whole time Mr. Treece has said, "validate, correct, and complete" as if that is something that is included in the contract. Well, it is not,

and Mr. Treece cannot in good faith say that it is.

The corrections to the Lauren design were done by BAE. If you look at the Statement of Work, any time it talks about correcting the Lauren design, it is done by BAE, and updating the Lauren design, it is done by BAE. What Fluor was told in the Statement of Work is that all of the changes to the process design would be included in Appendix G, which is the Lauren design and the process design that Fluor was provided by BAE when it bid this work.

And so the implied warranty of specifications is a claim that comes from *Spearin* and is adopted in Virginia that if the owner or general contractor hands a design to the design/builder and says, "Use this design to complete the work," then the prime contractor also gives an implied warranty that the -- or the design that they provide can be used for that purpose. And our claim is that the Lauren design was defective, there were clashes, there were errors, none of which we were told, and none of which Fluor was able to find before executing the contract.

So there were all of these things in there that made it such that Fluor could not complete the design within the time or within the cost that it anticipated on the project, and that is the implied warranty of specifications in a nutshell. It has nothing to do with who has the final design responsibility. It has to do with the fact that we were given

a design, told to use it, to validate and complete, and we could not do that within the time or the cost that was anticipated and agreed to by the parties under the contract.

THE COURT: I appreciate that, Ms. Barnes, and I thank you for that. I do, I appreciate your argument.

MR. TREECE: Your Honor, can I just very quickly? Two minutes. I promise no more than two minutes. There's just one issue I want to stress, and that is, Your Honor, I just want the Court to think conceptually about two different things: One, the Lauren design and whether that's required under the contract. That's why we call out specifications and equipment being different. So Lauren design is one issue.

The other issue that they talk about is directed changes, changes being made to the process equipment during the course of the contract, right? So that's a separate theory for their claim. They don't allege anything -- the only thing they allege in their contract with respect to that are the valves, right? The only equipment they claim that there was a change with respect to in their pleadings is the valves.

So that's the only thing that we've got from them on that issue. And what they're trying to do is conflate the two to make it seem like this big issue when, really, the Lauren design is not a contract requirement, right? It is a for-reference only, to the extent you can use it, validate it

and complete it. That is your obligation.

The redlines that they're talking about are redlines based on a process hazard analysis that Lauren did, that they didn't get to add into before. But they received that precontract, they got paid. We paid Mustang, their design subcontractor, 500 hours of work to assess the state of affairs. And, again, they are the design/build contractor with the represented expertise to assess it.

So those are the issues I wanted to point out, Your Honor. And we --

MS. BARNES: If I might just say --

THE COURT: No.

MS. BARNES: -- that I think that all of what Mr. Treece just said we dispute factually, and so on a motion to dismiss -- he's not citing to the counterclaim, he's not reading the counterclaim correctly, and so on a motion to dismiss on 12(b)(6), outside of the counterclaim there's no argument here. And this motion to dismiss should not be granted on the mere fact that in order to make his argument Mr. Treece has come up with G-10 and equipment specifications and all these things that have nothing to do with the implied warranty and specifications.

THE COURT: Okay. Thank you all for that. I was fully aware of those arguments on each side. I appreciate you-all feeling like you wanted to add something else, but

I've got this, okay? I understand these arguments and I appreciate it.

The last argument -- we've gone on for two hours, which is about three times what the Fourth Circuit is going to give you on any kind of motion at the end of the trial. But the last issue is the Rule 12(b)(6) motion filed by BAE with regard to these -- the two issues, the excess -- no, I'm sorry. I'm sorry, it's not BAE's. It's Fluor's 12(b)(6) on the excess cost for descoped work and the abnormal maintenance work, the $9 million deal cut with the Army, okay? So it's Fluor's motion to dismiss on that.

Let's hear -- and I have a pretty good handle on this, but I'd be happy to hear whatever else you-all would like to say that might be helpful to the Court.

Let's hear from Fluor first; it's your motion.

MR. FITZSIMMONS: Thank you, Your Honor. Scott Fitzsimmons again. And understanding your request to provide some alacrity to these briefings here, let me -- if you don't mind, I'm just --

THE COURT: Let me just say that with regard to these issues y'all have done a great job fleshing them out in the briefing. I obviously just got the slideshows this morning and have not studied them, but I've looked through them as we've gone. Y'all have done tremendous work for your clients of making your positions clear. It is a lot for me to absorb

all at one time. I'm trying to do the best I can, and I just want you to know I appreciate the work that you-all have done.

MR. FITZSIMMONS: Thank you, Your Honor. With regard to Fluor's partial motion to dismiss, Fluor's motion to dismiss is based on two fundamental arguments. One, BAE is asking for what is known -- what they are calling excess costs for work that they descoped, that BAE administratively used a contract clause to descope from the contract, or has been calling it a descope. Yet BAE now requests excess costs to -- and, fundamentally, that is the administrative building and the laboratory. BAE removed that work from the contract, BAE hired another contractor to perform that work, and BAE did not terminate for default, they did not partially terminate for cause. They simply removed, just like all the changes that we're talking about right now, which are additive changes, BAE has the right to issue deductive changes. And when BAE issues a deductive change, they do not then have the right to seek excess costs for whatever costs BAE would incur, because they then control those costs. They removed it administratively, they admit that they had no obligation to do it, and -- let me just go through. So the excess costs must be dismissed.

Finally, and second, Your Honor, BAE's request for this abnormal maintenance cost, this sweetheart deal that BAE executed at Mod 17 with the Army, are prohibited consequential damages. Not only did BAE calculate these alleged damages

based on the estimated amount of what they're calling abnormal maintenance on the existing legacy facility, but BAE does not, cannot, and has not since the complaints have been filed alleged that they performed one element of abnormal maintenance on the NC legacy facility. So there's no actual damages that were incurred. Nevertheless, they negotiated this $9 million deal with the Army, and in their agreement with the Army BAE agreed that if they don't perform maintenance on the legacy facility, well, then, BAE will perform maintenance anywhere on the project completely unrelated to -- now, abnormal maintenance, Your Honor, is certainly not anything that the parties could have contemplated. It's simply called abnormal maintenance.

In addition, there were intervening events that make these absolutely consequential damages. The principal intervening event being at under no circumstance did Fluor anticipate that BAE would enter into an agreement with the Army whereby they would agree to modify the barracks or change the golf course, or whatever it may be.

And BAE's argument is that, "Well, they're just paying back the damages through a bartering system." But that's a false narrative, Your Honor, because the damages, as set forth in their -- in their complaint and in their briefing were calculated based on the amount of estimated maintenance that would be performed. It wasn't direct damages such as

additional rental costs or additional labor, something that would be a direct and proximate result of any alleged breach by Fluor. So the abnormal maintenance cost must be dismissed as well.

And then, third, in its complaint BAE alleges 6.7 million in what they call additional concessions to the Army. Yet, in its briefing, in their opposition brief, BAE admits that they haven't paid that amount. So they have no damages. So, fundamentally, they have no breach of contract action with no damages, yet they claim -- they somehow reserve their rights to bring that. So I'll go through this fairly quickly.

THE COURT: Well, let me just -- aren't there questions of fact as to each one of these? I mean, you argue it's really a matter of they didn't properly plead entitlement, or they didn't properly plead causation on these. Isn't there really fundamentally as to all of these questions of fact?

MR. FITZSIMMONS: Not necessarily, Your Honor, because the document upon which BAE relies, and then they cite that they administratively -- and we included this in our briefing, because BAE relied on it in their complaint, states clearly with regard to the excess costs -- these are BAE's words: the descoped work, the deductive change order, the deductive change order will be issued under the contract

Changes clause. These aren't words that Fluor made up. This was a letter that BAE sent to Fluor, and it was BAE who elected rather than to use the termination for default provision -- and, in fact, there are two termination clauses in this contract. Rather than partially terminate, which would authorize BAE to, in fact, potentially recover if the termination was proper these excess costs, these are BAE's words: BAE stated that they are removing this work, the admin building and the laboratory, under the Changes clause. They used the word "deductive change."

THE COURT: But they argue the reason why they had to do this was because of Fluor's delay. So wouldn't that be, as, you know, a plausible claim that this -- they had to go out and spend extra money on this descoped work because y'all weren't doing it in time? Isn't that a plausible claim under *Iqbal* and *Twombly*?

MR. FITZSIMMONS: It would be a plausible claim, Your Honor, if it had any support whatsoever in the actual actions that occurred on the project. This letter is the letter that BAE sent to Fluor. They do not mention in this letter that they are removing this work because Fluor is delayed, not at all.

In their complaint, BAE argues that somehow -- BAE argues that somehow, "Well, we're going to let Fluor focus on other critical activities." But I think it was Mr. Treece who

said, "Well, you can't run away from the documents." This is the document, and it says right here that the reason the admin building and the laboratory were removed is because the parties could not agree with the co-location of it, so they removed it.

THE COURT: But isn't that a question of fact?

MR. FITZSIMMONS: Your Honor, this plainly sets forth BAE's contemporaneous interpretation of what they were invoking. And, in fact, in their -- in their complaint, they do not invoke changes -- they do not invoke the Termination clause whatsoever. They don't plead the Termination clause, they don't mention the Termination clause because they know they cannot do that.

They know they cannot plead the Termination clause because, fundamentally, what BAE did on the project is entirely different than what BAE now seeks from this Court. BAE sought an administrative deduction of the laboratory and the admin building during the project. Now they walk into this Court and they're telling a completely different story. They're saying somehow they terminated because of delay. It just doesn't match up, Your Honor.

THE COURT: I appreciate that, Mr. Fitzsimmons.

MR. FITZSIMMONS: And these are -- just for your edification, these are the two Termination clauses.

THE COURT: I saw that.

MR. FITZSIMMONS: It allows a partial termination, and BAE did not take that action.

Now, moving on to the abnormal maintenance. This claim for abnormal maintenance must be dismissed because there is unenforceable consequential damages.

THE COURT: Is there a question of fact as to whether this $9 million is a consequential or a direct damage?

MR. FITZSIMMONS: The way that the -- the way that BAE describes this -- these damages, these alleged $9 million of damages in the counterclaim is that it was for maintenance on the existing NC facility. Maintenance on the existing NC facility is a consequential damage.

For example, if the HVAC broke on the existing NC facility, there was an intervening event that caused that HVAC to break, and that would be either age or weather or something else, if the roof on the existing NC facility leaked, there was an intervening event that caused that roof to leak, a lightning strike, it rusted, those types of damages are not a direct and proximate result of Fluor's delay on the project.

THE COURT: But you take it a step further. What they say, okay, just for the sake of argument, Mr. Fitzsimmons, what they say is, "No. No. No. No. You can't look to the maintenance we were doing on the golf course," or you say the barracks or whatever this other stuff is, or a piece of equipment that goes out. What they say is,

"The 9 million we agreed to was directly caused, we allege, by Fluor's delay because the Army was going to cancel our contract unless we agreed to it." So that would be more in the nature of a direct -- that 9 million -- the overall agreement to pay the 9 million, wouldn't that be a direct consequence of Fluor's delay -- as they allege, right? -- as they allege, as opposed to a consequential damage?

MR. FITZSIMMONS: Your Honor, the analysis that would need to be performed in order to determine whether any termination was threatened, proper, appropriate -- a termination for default of a government contract, as the federal circuit has identified, is a draconian step, and the analysis that would necessarily be performed -- they haven't alleged that the contracting officer performed an appropriate analysis. They haven't alleged that a termination would even be proper under these situations in light of, especially, the extension of time that Fluor would be entitled to as a result of all of the delays caused by BAE's actions.

So this sort of red herring argument that, "We would have been terminated" does not convert what is truly a consequential damage into some kind of direct under the threat of termination. A threat of termination does not convert these damages that are truly consequential to a direct damage arising --

THE COURT: That is in fact what they argue.

MR. FITZSIMMONS: It's a baseless claim, and it is not a surviving -- and it is not a plausible claim, as Your Honor identified under *Iqbal*. That somehow there was this threat of termination out there, and that's why -- and again, the contemporaneous documents upon which you can review, because they are identifying this specific action that they took, do not state that the reason we are removing the admin building or laboratory is because we have a threat of default. That is not the reason that BAE (inaudible).

THE COURT: And simply because it's not in the documents, does that mean that I can rule that way or does it present a question of fact?

MR. FITZSIMMONS: Well, they did not plead any of that, Your Honor. They pled that they identified a removal of this for -- to allow, I think, Fluor to focus on more critical activities. But when you look at the supporting records, which you can because they rely on those supporting records, it's -- again, they took one step during the project and they took a completely other step during this litigation.

THE COURT: Mr. Fitzsimmons, thank you for that.

I think Justin Simmons was going to argue this. I have a pretty good handle on this. This was the first set of briefs that I read, and I studied these carefully. And I thank you for that.

Let's hear from Mr. Simmons.

MR. SIMMONS: Yes, Your Honor. As evidenced by your questions to Mr. Fitzsimmons, I think Your Honor does have a good handle on the parties' positions here, so I would just like to make a few points quickly.

THE COURT: You know, Mr. Fitzsimmons picks up on Mr. Treece's argument on the other issues and says, "Look, you can't stray from the documents here. You can't stray from what really happened. And with regard to this descope, you did it as a deduction from the contract, and so you can't come now and claim that it was breach and it was caused by our delay. And you didn't terminate us for cause; you didn't use that provision of the contract. You used the deductive change part, and so you don't get to get damages for that." Why doesn't that make sense?

MR. SIMMONS: Your Honor, I think, and it's absent from Fluor's presentation both on brief and in its slides, but the provision we rely on in seeking those damages is Section 28(e), which says, "In the event of an unexcused delay, Fluor agrees to reimburse BAE systems all damages and expenses incurred by BAE systems due to contractor's failure to complete the work by such time."

We allege plausibly in our complaint that Fluor failed to complete the project by July 30th, 2018, and as a result the Army issued a show cause notice -- it's part of our pleadings -- and threatened to terminate unless we took

certain remedial actions. And one of those actions we determined that was appropriate was to descope certain work so that we could complete that work and Fluor could complete other work that was part of its original scope in order to meet the Army's deadline. That was only required because Fluor failed to meet the July 30th, 2018, completion deadline.

Your Honor, so the focus should be on 28(e), and that's what we're claiming here. It says that Fluor agrees to reimburse BAE, "for all damages and expenses incurred as a result of its failure to complete the project on time." That's what we're alleging here. The same goes for --

THE COURT: How is that consistent with what you-all did when you descoped that? What Mr. Fitzsimmons says is that, no, that's not what you did. You used a different provision of the contract, so you can't come in now and try to rewrite history.

MR. SIMMONS: Well, Your Honor, (A) that document that they have attached, we do not -- under the Fourth Circuit precedent, that is not to be considered on a 12(b)(6). That is not integral to our complaint.

But, two, if you look at that document, it plainly states "delay." We are relying or seeking these damages because of a delay. If Fluor had completed the project on time, there would be no need for us to descope that work and no need for us to incur the cost that we did. So we ought to

be able to recover the difference between what we would have paid Fluor and what we had to pay another subcontractor to complete the work. And we plausibly allege that in the complaint.

THE COURT: Well, why didn't you terminate for cause and go that way? Why did you use the deductive change? That seems mutually exclusive to me.

MR. SIMMONS: I don't believe so, Your Honor. I mean, Mr. Fitzsimmons right there talked about termination being a draconian remedy. Here the parties were trying to work together, or at least BAE was, to meet the Army's deadline. And under those circumstances, we determined that best course was to descope that work and have another contractor perform it and recover whatever the difference was, which we're plainly allowed to do under Section 28(e).

Now these go to matters of proof, Your Honor. Whether that was, you know, necessary and reasonable, those are matters of fact. We're going to have to prove that, and we admit that. But they're not matters for a 12(b)(6), for the Court to determine on a motion to dismiss, because we plausibly alleged it in the complaint.

The same goes for the $9 million in consideration we had to provide to the government. We have attached the show cause notice. The government was threatening to terminate. In fact, it issued a request for information about other

interests from other contractors in completing the project.

So we had two options: (A) we let the government terminate the contract; or (B) we make some kind of concession, we give some kind of consideration for the delay. And they demanded consideration. That's a direct result of Fluor's failure to perform the contract on time, Your Honor. So these are not consequential damages; these are direct damages.

It's no different than in the case law that we cite. For instance, the *Hemenway* case where they're trying to build a furniture store, and because of the contractor's delay the owner had to continue to pay rent on a legacy facility. The same thing is true here. There was a delay --

THE COURT: Yeah, but, I mean, this is -- I mean, the kind of thing they talk about as direct damages in the case law is like -- you know, in the *Roanoke Memorial* case it involved increased financing costs and things like that. I think the language of the cases say it has to be predictable and within the contemplation of the parties. And how can you say cutting this $9 million deal with the Army could be predictable or within the contemplation of the parties?

MR. SIMMONS: So how is it not predictable that if Fluor failed to live up to its bargain -- because we relied -- we told the Army we're going to be able to complete this project on such and such a date. In order to meet that

deadline, Fluor had to do its part and complete the project by July 30th, 2018. If it failed to meet its part, it was perfectly predictable that BAE was not going to be able to live up to its bargain. And the government knew that, and so the government threatened to either terminate or we give them some kind of money for the delay, some kind of consideration. And here we go, they agreed on the $9 million.

There's an interesting part in one of the cases that we cite, the *Hiss v. Friedberg* case. That involved the recovery of attorney's fees.

THE COURT: Attorney's fees, right. Right.

MR. SIMMONS: But in that case the defendant complained, says, "Well, you know, they should have -- the plaintiff should have bought out the leasehold interest. They could have paid much less than what they're seeking for that leasehold interest." And the court rightly points out, says, "Hey, defendant, you could have come out and bought the leasehold interest." Same for Fluor. We tried, we issued them a show cause notice, saying that the Army is going to terminate this contract. We had to do something to get the extension that we needed. Fluor, as alleged and as shown in the attachments, refused to participate in that process. It can't now be heard to complain that, "Why did you pay this money to the government?" Well, because the government was going to terminate the contract.

But, again, that gets back to matters of proof. Whether the $9 million was reasonable, that's a matter of fact for the Court to determine after discovery and the presentation of evidence. And the same goes for, you know, whether it was -- the other expenditure couldn't be avoided. That's, again, a matter of fact that we're going to have to prove.

Your Honor, I find it -- I hope the Court appreciates the irony here. It's a classic example of approbate/reprobate. Here on one hand they're saying, "Don't hold us to a limitation of damages provision." On the other hand, "Let's hold BAE to a limitations on damages provision."

And Your Honor asked Mr. Treece a question about why would Fluor agree to this $30 million limitations. Well, the exact reason why they did is because the consequences would have been dire. If the Army had terminated the contract as a result of Fluor's unexcused delay, BAE could then look to Fluor for those damages.

Now, Fluor determined at the outset that better to cap them at 30 million. And so we're not saying we're not held to that. In fact, in our complaint we make it clear that we are, that we sustained more damages but we're limited to 30. And we submit, Your Honor, on these facts, as alleged, that we've stated plausible claims for both the excess cost from the descoped work and the $9 million in consideration

provided to the government to avoid default. We ask that Your Honor --

THE COURT: I appreciate that, Mr. Simmons, and I appreciate you tying those arguments together. That's thoughtful, because each side would like to benefit from a provision limiting damages in this case. But when it comes to that particular provision, each side also argues that it ought not to apply. You-all argue that the consequential damages provision shouldn't apply to the $9 million of abnormal maintenance, and the other side argues that the 30 million cap shouldn't apply for a variety of reasons, which we've been over.

MR. SIMMONS: I think there's one difference, though, in what the parties' position is. They argue as a matter of law that that provision is null and void. We don't submit that. It's fully enforceable. We argue as a matter of fact these are direct damages. You know, if the Court upon presentation of evidence concludes otherwise, then we're stuck to that, because the contract does plainly exclude consequential damages.

THE COURT: Thank you for that, Mr. Simmons.

Mr. Fitzsimmons, this is your motion. I'll let you be heard. I'll give you the last word on your 12(b)(6), sir, if you will.

MR. FITZSIMMONS: Certainly, Your Honor. I just want

to follow up with the last statement that Mr. Simmons made about the limitation of damages provision being null and void. Now, obviously Your Honor understands the two-step analysis that you must undergo, which is first to analyze whether the limitation of damages in fact applies to changes, but then whether or not there is a Virginia code. The reason we argue that the limitation of damages is null and void is because we have a very clear Virginia code that prohibits any waiver of claims for demonstrated additional costs.

BAE doesn't have anything like that in this situation. BAE clearly waived consequential damages. There's no doubt that the type of damages that they are seeking with regard to the $9 million is, quote, "abnormal maintenance." They don't call it regular maintenance. They don't call it, you know, I'm greasing the doors. They call it abnormal maintenance. We believe fundamentally it's because BAE was actually being paid for all of its regular maintenance because they have a cost reimbursement in the contract with the Army and they were getting paid for all regular maintenance. So they're calling it now abnormal maintenance. So, fundamentally, that type of damage is a consequential damage, Your Honor. So with that, we'll rest on the motion.

THE COURT: Thank you, Mr. Fitzsimmons.

Let me just say that I know there's lots of other folks on the call other than Mr. Treece and Mr. Simmons and

Mr. Fitzsimmons and Ms. Barnes that I know have had a great deal to do with the work in this case. I want to say that this is -- you present some interesting issues that the Court has tried to reckon with.

I was prepared to rule from the bench on several of these motions, but I'm not going to today because -- I appreciate your arguments. We've had two and a half hours together, yeah, almost two and a half hours together. I want to study these, again, these PowerPoint presentations and focus on some of the points that you-all have made today during your argument.

But one of the things that concerns me is the scope of this litigation. It looks like we have a trial date in this case set I think maybe March or April of next year, right?

MR. FITZSIMMONS: Right.

THE COURT: As I look at my docket, you-all have scheduled this for a bench trial, right?

MR. FITZSIMMONS: Correct.

THE COURT: Wow. I've had some bench trials in Federal Tort Claims Act cases and every time I do one of those, I say to myself, man, I wish I had a jury. But I appreciate you-all -- that this is for a bench trial. So that's not to say that the Court may not impose an advisory -- impanel an advisory jury.

The guy I clerked for, Judge James C. Turk, used to always impanel an advisory jury. In 1989, I tried a -- "I tried." I was on the trial team; I shouldn't say I tried it. With Bill Kopit of D.C., and Bill Poff and Heman Marshall of Roanoke, we tried an injunction case brought by the government under Section 7 of the Clayton Act involving the Roanoke Memorial Hospital and Community Hospital, the merger of those two hospitals. We tried an injunction case, and Judge Turk impaneled an advisory jury in that case. And as it turned out, as was the case with Judge Turk generally, he was very wise. And so I haven't gotten there yet; this is a long way off. There are a lot of things I have to think about on these motions, and y'all have spent hundreds of pages and referred to lots of different contract provisions.

I do have, as my new law clerk on this case, this is his second week, this is Zach Turk, who is Judge Turk's grandson, and he is working for me on this case, and he's thrilled that he got this simple and easy case to start as his first case that he's working on for me. He is just -- we spent some time yesterday afternoon together going over the arguments after we all went through them and there's a lot going on here.

But let me ask you a question: Where do you-all stand on discovery? Have you started even? I mean, you've got a trial a year from now. Where do you stand on discovery?

MR. TREECE: Your Honor, so with respect to discovery, we filed a motion to bifurcate. To the extent that anything survives our motion to dismiss, we think it makes a lot of sense to determine what the contract requires first before we delve into seven years of contract performance and the minutiae of every single change order. Because what the contract requires in terms of who has design responsibility is going to dictate whether the vast majority of these change orders are even still at issue, right? So I think determining design responsibility will address that issue. The applicability of the damages cap will certainly affect the analysis there.

So we had proposed a tiered analysis of doing, you know, maybe a limited hearing with the Court -- limited discovery and a limited hearing on what the contract requires, right? So if we needed to do limitation of damages discovery with Lura Lewis and Erin Phalen and the like, we can do that in a discrete manner, present that in a short hearing, and that would excise a large portion of the case to the extent that anything remains after the motions to dismiss.

That's what we had proposed. We raised that with Judge Ballou, and then Judge Ballou said, "Well, you know, this is a bench trial so I'm going to defer that issue to Judge Urbanski. I'm not going to rule on that."

There was a motion to compel, because we were trying

to stay all this until we could find out sort of what the design -- what the Court concludes the design responsibilities are and whether the Lauren design is even -- could support a claim, because that will just take up the vast majority of the case. And so Judge Ballou ordered us to respond to written discovery responses by the 19th, I think it is, and then we're to agree on search terms.

One of my proposals to Judge Ballou was that, well, perhaps we do search terms that are limited to the contract interpretation issues, and do the first set of the case on contract interpretation, do the second set of the case on contract performance. I think that is a very efficient way to proceed.

I know that motion is not technically set for hearing today and we've already, you know, used a lot of time. I think the Court can look at the briefs and certainly understands the case and what's going on in the case, and could appreciate the benefit that could arise from having limited discovery on contract interpretation, what does the contract require. Okay, here's what the contract requires, what's left, and then do performance discovery in the second phase.

THE COURT: But the problem with that, though, Mr. Treece, is that what Ms. Barnes was talking about, and that is, you know, she said that a lot of the damages -- I

mean a lot of the money that Fluor had to spend in this case were because of delays that BAE caused and it wasn't Fluor. So how is -- if a lot of their claim is due to -- is not due to them and their delay, how can we -- how can we parse the discovery? I worry about that.

MR. TREECE: Well, because what they're saying is they're really saying the delays were caused by the Lauren design and efforts we had to do to correct the Lauren design that we didn't anticipate. It's really the Lauren design is what they're talking about.

So if the Court were to say the Lauren design is not a requirement of this contract for you to abide by that, there's no implied warranty over that, then they're going to go to the second aspect of their claim, were there any directed changes over the process equipment that really affected this. I'm not sure that there are any. The valves maybe. Maybe there's more.

I'm not trying to represent that I know all of those performance facts over the course of seven years. What I'm saying is it will fundamentally strike the vast majority of their changes just to have a ruling on the Lauren design not being in the contract and the limitation on damages being enforceable.

And, you know, if we're limited to 30 million, I realize that sounds like a large number in the run-of-the-mill

case, in the context of this case with a 245 million contract, a $14 million contingency, in the run of this particular case that is something that could bring the parties closer together for --

THE COURT: Look, it's clear to me that the Rule 12(f) motion, that's why I started with it, it's clear to me that the Rule 12(f) motion and the applicability of that $30 million has huge impact for this litigation. I get that. I understand.

Let's hear from Mr. Fitzsimmons or Ms. Barnes about where you stand on discovery and what your perspective is.

MR. FITZSIMMONS: Your Honor, I appreciate the opportunity. So Mr. Treece is right, they moved to stay discovery. The reason they moved to stay discovery is because BAE elected not to respond to Fluor's request for production of documents or interrogatories, and BAE unilaterally and on its own just elected not to respond and moved to stay discovery.

And during the course of those arguments, I believe it was Judge Ballou who said, "Well, wait a minute. This is a huge case and the discovery will be monstrous." And one of the issues that Your Honor brought up just today, and that was the subject of the argument, is what Mr. Treece is asking to sort of parse out, and that's design responsibility.

But you heard that BAE started today and Mr. Treece

said for about 15 minutes that Fluor was solely responsible for the design. Yet in their own briefing, on page 5 of their reply brief, BAE states, "To be clear, BAE does not and has not argued that Fluor is responsible for all aspects of the design." So the arguments, Your Honor, that -- with regard to design responsibility that Mr. Treece is trying to carve out is the entirety of the case.

THE COURT: No, Mr. Fitzsimmons, I get that. And I also worry -- I worry that there's questions of fact tied in there as opposed to just questions of law. That's what troubles me about that.

And the other thing that the law clerk and I talked about this week was, holy cow, we can't hold this case up any longer. These motions to dismiss were filed last summer, right, and briefed last summer. It's taken until now to get a hearing. I don't think that's my fault, but if it is I'm sorry.

But we can't drag our feet on this case and expect to hold that trial date, because there's a lot of discovery that has to be done, and then -- and on any issues that remain, Rule 56 motions, there's a lot of work that has to be done in this case, I mean a lot of work that has to be done in this case. So that's why I raised the issue of the trial date and I raised the issue of where you stand with discovery.

So, Mr. Fitzsimmons, your position would be we need

to get going on discovery; is that fair?

MR. FITZSIMMONS: We need to move now, Your Honor.

THE COURT: I hear you, because a year from now is nothing. When you're looking at litigation of this magnitude, a year is nothing, especially when you've got to have Rule 56 motions filed so many weeks before trial.

Okay. All right. Well, I appreciate that perspective. I do not intend to let moss grow on my rulings, okay? I'm going to -- I have an idea as to what I want to do with these 12(b)(6) motions, and I have an idea as to what I want to do with this Rule 12 motion, and I had an idea going in. The arguments today have helped me think about it, but I want to go back and study these -- study these -- look at the briefs again and study these PowerPoints that you-all have presented, which really crystallized your argument and brings things together for me a very helpful way.

So I appreciate the work. The clients should know that the work and all the money that got spent on those PowerPoint presentations are helpful to the Court in trying to reach a resolution here. So that's helpful.

Mr. Treece, did you want to say something else?

MR. TREECE: I did, Your Honor, and that was just that we're not trying to hold up discovery. We're trying do an orderly process of discovery, because there's no reason for us to go do discovery on every single change order if there's

going to be a ruling of here's what the contract requires, that excises those change orders in their entirety. There's no reason to talk to witnesses on those change orders.

We've got change orders that are tens of millions of dollars. We don't need to go into the weeds on every duct bank that was installed everywhere and do all this if the contract says they're responsible for the duct bank, right? I mean, I'm just throwing that out as an example. On the brief, I just wanted to respond to that.

With respect to the design responsibility, the only thing we ever said we were responsible for doing was procuring the equipment and getting the materials, right? So we're responsible for equipment and materials; that's the specifications that we've talked about.

And, again, if there's changes after the fact to a particular piece of equipment they allege caused them harm, we can do discovery on that if we need to. I'm not aware of what that would be. I do think that if we structured this in what are the contract requirements, discovery on what the contract requires, and then discovery on performance will be a more efficient way than having everyone run full steam at $200 million of change orders for things that may end up being irrelevant depending on what the parties' obligations under the contract are.

So we would propose limited discovery on those

issues, limited witnesses, a limited hearing on that, the Court can rule on what the contract requires, and then we can proceed to the performance discovery with respect to the change orders that remain, if any.

THE COURT: Okay. I hear what you have to say, Mr. Treece.

Mr. Fitzsimmons, any response?

MR. FITZSIMMONS: Just very briefly. You know, Your Honor mentioned the limitation of damages. It's our position that even to the extent that the limitation of damages applies, which we do not believe it does, we would still -- Fluor would still be obligated to present all of its damages. BAE believes that if it's a $30 million case, then somehow Fluor will pick and choose which PCNs it will be presenting. But, fundamentally, not only to preserve the claims for appeal, but also to present all of the damages to this Court, to the extent that any limitation of damages does apply, which, again, we do not believe it does, we would have to present all of our damage, all $180 million of our damages, and then Your Honor could decide whether or not there is a limitation cap. So that would prevent what Mr. Treece is offering, which is somehow we would be minimizing discovery if there's a limitation of damages or if they cut out design issues, extra.

THE COURT: Thank you for that, Mr. Fitzsimmons. I

appreciate it.

Okay, folks. Thank you-all for today's arguments. The law clerk and I will take a look at these PowerPoint presentations. I'm going to try to get you a sketch of a ruling on these motions sooner rather than later so that we can get you-all going on an appropriate discovery path.

Thank you all. I hope everybody stays well. I appreciate our time together via Zoom, and if there's nothing further, we will stand adjourned. Thank you so much.

(Court recessed at 12:39 p.m.)

CERTIFICATE

I, Judy K. Webb, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Judy K. Webb Date: 1/25/2022